142-691

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 155.

THE HOME BENEFIT ASSOCIATION, PLAINTIFF IN ERROR,

vs.

HENRIETTA P. SARGENT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 5, 1888.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United for the southern district of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you or some of you, between Home Benefit Association, plaintiff in error, and Henrietta P. Sargent, defendant in error, entered the 29th day of June, 1888, a manifest error hath happened to the great damage of the said Home Benefit Association, plaintiff in error, as is said and as appears by its complaint, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capital, in the city of Washington, together with this writ, so that you have the same at the said place before the justices aforesaid on the second Monday of October next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Seal of U. S. Circuit Court, South. Dist. New York.

Witness the Honorable Samuel F. Miller, senior associate justice of the Supreme Court of the United States, this 16th day of July, in the year of our Lord one thousand eight hundred and eighty-eight, and of the Independence of the United States the one hundred and thirteenth.

JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

Allowed July 14, 1888.
WM. J. WALLACE.

2 [Endorsed:] E. & A. A. 748. U. S. supreme c't. Home Benefit Association ag'st Henrietta P. Sargent. Writ of error. U. S. circuit court. Filed Jul. 17, 1888. John A. Shields, clerk. Service of the within writ of error is hereby admitted. N. Y., July 16, 1888. Miron Winslow, pl'ff's att'y.

UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages numbered from

three (3) to one hundred and twenty-one, inclusive, contain a true and complete transcript of the records and proceedings had in said court in the case of Home Benefit Association, plaintiff in error, against Henrietta P. Sargent, defendant in error, as the same remain of record and on file in said office.

Seal of U. S. Circuit Court, South. Dist. New York.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this first day of October, in the year of our Lord one thousand eight hundred and eighty-eight, and of the Independence of the United States the one hundred and thirteenth.

JOHN A. SHIELDS, *Clerk.*

3 Circuit Court of the United States for the Southern District of New York.

HENRIETTA P. SARGENT, Plaintiff,
vs.
THE HOME BENEFIT ASSOCIATION OF NEW YORK, N. Y.

Timothy Griffith, clerk circuit court U. S., southern dist. of N. Y.:

You will please issue a summons to the defendant, The Home Benefit Association of New York, N. Y., in the above-entitled action.

MOULTON, JOHNSON & LEVY,
Attorneys for Plaintiff.

Office and post office address, 154 Nassau street, New York.

(Endorsed:) Circuit court U. S., southern district of N. Y. Henrietta P. Sargent *vs.* The Home Benefit Association of New York, N. Y. Præcipe for summons. Moulton, Johnson & Levy, attorney-for plaintiff, 154 Nassau St., N. Y. city. U. S. circuit. Filed Mar. 25, 1887. Timothy Griffith, clerk.

4 United States Circuit Court for the Southern District of New York.

HENRIETTA P. SARGENT
against
THE HOME BENEFIT ASSOCIATION OF NEW YORK, N. Y.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

Witness the Honorable Morrison R. Waite, Chief Justice of Su-

preme Court of the United States, at the city of New York, this 25th day of March, in the year one thousand eight hundred and eighty-seven.

[SEAL.] TIMOTHY GRIFFITH, *Clerk.*

MOULTON, JOHNSON & LEVY,
Plaintiff's Attorneys.

Office and post office address, 154 Nassau St., N. Y. city, New York.

5 U. S. MARSHAL'S OFFICE, S. D. N. Y.

Rec'd Mar. 25, 1887.

UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

I hereby certify that on the 29th day of March, 1887, at the city of New York, in my district, I personally served the within summons upon the within-named defendant, The Home Benefit Association of New York, N. Y., by exhibiting to Eugene A. Baker, secretary of said company, the within original, and at the same time leaving with him a copy thereof.

Dated March 29, 1887.

M. T. McMAHON,
United States Marshal, Southern District of New York,
Per JOHN E. DOWLEY, *Deputy.*

6 United States Circuit Court for the Southern District of New York.

HENRIETTA P. SARGENT
against
THE HOME BENEFIT ASSOCIATION OF NEW YORK, N. Y. } Notice of Appearance.

SIR: Please to take notice that the defendant, The Home Benefit Association of New York, N. Y., appears in this action, and that I am retained as attorney for such defendant therein.

N. Y., April 16th, 1887.

Yours, &c., FRANCIS LAWTON,
Attorney for Defendant, 170 *Broadway, New York.*

To Moulton, Johnson & Levy, Esqs., plaintiff's attorneys, and to Timothy Griffith, Esq., clerk of the U. S. circuit court for the southern district of New York.

(Endorsed:) U. S. circuit court, southern district of New York. Henrietta P. Sargent ag'st The Home Benefit Association of
7 New York. Notice of appearance. Francis Lawton, 120 Broadway, New York, attorney for defendant. To Messrs. Moulton, Johnson & Levy, plaintiff's attorneys. U. S. circuit court. Filed Apr. 18th, 1887. Timothy Griffith, clerk.

8 Circuit Court of the United States, Southern District of New York.

HENRIETTA P. SARGENT, Plaintiff,
against
THE HOME BENEFIT ASSOCIATION OF NEW YORK, N. Y., Defendant.

Henrietta P. Sargent, the plaintiff herein, complaining of the Home Benefit Association of New York, N. Y., the defendant above named, alleges upon information and belief as follows:

First. That she is a citizen of the State of Massachusetts, residing in West Medford, in the said State.

Second. That the defendant is a corporation duly created by and existing under the laws of the State of New York, to wit, a life insurance association, and is a citizen of the said State of New York.

Third. That on the 5th day of September, 1885, in consideration of the premium paid or agreed to be paid by the plaintiff or by Edward F. Hall, Jr., then of San Francisco, California, the said defendant issued its certificate or policy of life insurance upon the life of the said Edward F. Hall, Jr., for the term of his life and delivered the same to this plaintiff, therein agreeing to pay to this plaintiff the sum of five thousand dollars upon the death of the said Edward F. Hall, Jr., said certificate or policy being numbered 5822
9 and dated at New York on the 5th day of September, 1885, a copy of which certificate or policy is hereto annexed, made a part hereof, and marked Exhibit A.

Fourth. That it was therein and thereby stipulated and agreed by and on behalf of the said defendant that the said sum of five thousand dollars should be paid to this plaintiff within ninety days from the receipt of satisfactory evidence to the association of the death of said member, Edward F. Hall, Jr.

Fifth. That it was also stipulated in said policy as follows:

"The said member is required to pay the sum of fifteen dollars as an expense fee, and a like sum annually on or before the day of the month in which this certificate is dated; also the amount of one mortuary assessment within sixty days from the date of this certificate, and thereafter within thirty days from the first week day of the months of February, April, June, August, October, and December of each and every year during the continuance of this certificate (or from such other periods as the board of directors may from time to time determine) the amount of one mortuary assessment according to the rates stated herein; and this certificate shall not be binding upon the association unless the said sum or sums shall have been actually paid to the association and during the lifetime of said member."

Sixth. That the said assured member, Edward F. Hall, Jr., paid all the sums of money and assessments to the said association and performed all the conditions mentioned in the foregoing stip-
10 ulation and all other conditions in said certificate or policy which were therein stipulated that he should perform.

Seventh. That on or about the 19th day of October, 1886, the said Edward F. Hall, Jr., the above-mentioned assured member, departed

this life at the city of New York, and that his death was not caused by any of the causes excepted from the operation of this policy; that immediately thereafter the plaintiff notified the defendant herein of the said death of the said Edward F. Hall, Jr., and that afterwards, on or about the 15th day of December, 1886, she furnished to the said association, the defendant herein, the satisfactory proofs of the death of the said Edward F. Hall, Jr., and delivered the same to the officers of the said association at their offices in the city of New York, and also notified the said association of her interest in this certificate or policy, and duly demanded payment to her of the sum to be paid by the said association, and, further, that she has performed all the conditions contained in the said certificate or policy which are therein required by her to be performed; that the said defendant has not paid the amount so due nor has it made any provision for the payment of the said sum of $5,000 to this plaintiff by assessing its members or otherwise, as it stipulated and agreed to do in its said certificate or policy.

Eight-. That more than ninety days have elapsed since said proofs of death were delivered by this plaintiff to the said association, as herein above stated, and demand for payment was duly made also at the expiration of ninety days; but that the
11 said defendant neglected, failed, and refused to pay the same and still refuses to pay the same, and that the said sum of five thousand dollars, with interest thereon from the 15th day of March, 1887, is due and payable to this plaintiff from the said defendant.

Ninth. The plaintiff further says that she was the sister of the said Edward F. Hall, Jr., the deceased assured member, and that at the time of the issuing and delivery of said policy or certificate it was made payable to this plaintiff, and that at that time she was a creditor to the said Edward F. Hall, Jr., for the sum of five thousand dollars and upwards, and the said certificate of policy was made payable to her to secure the payment to her of this said indebtedness of the said Edward F. Hall, Jr., in the event of his death.

Tenth. That the said indebtedness of five thousand dollars and upwards of the said Edward F. Hall, Jr., had not been paid at the time of the said Hall's death, nor has it since been paid nor any part thereof, but remains wholly due and owing and unpaid to this plaintiff.

Eleventh. That nothing has ever been done by this plaintiff or by the said assured member, Edward F. Hall, Jr., to vitiate, avoid, or forfeit said certificate or policy or any of the conditions thereof, and that the same was in full force and effect at the time of the death of the said assured member, Edward F. Hall, Jr.

Wherefore plaintiff prays for a judgment against the said defendant for the sum of five thousand dollars, with interest thereon from the 15th day of March, 1887, together with the costs of this action.

MOULTON, JOHNSON AND LEVY,
Plaintiff's Attorneys.

12 P. O. and office address: Tribune building, 154 Nassau St., New York city, N. Y.

STATE OF MASSACHUSETTS, } ss:
County of Suffolk, City of Boston, }

Henrietta P. Sargent, being duly sworn, deposes and says that she is the plaintiff in the above-entitled action; that she has read the foregoing complaint and knows the contents thereof; that the same is true of her own knowledge except as to those matters therein stated to be alleged upon information and belief, and that as to those matters she believes it to be true.

HENRIETTA P. SARGENT.

Sworn to before me this — day of March, 1887.

ALFRED C. VINTON,
Justice of the Peace throughout all the State of Massachusetts.

[SEAL.] HENRIETTA P. SARGENT.

13 COMMONWEALTH OF MASSACHUSETTS, } ss:
Suffolk, }

CLERK'S OFFICE, SUPREME JUDICIAL COURT.

I, John Noble, clerk of the supreme judicial court for said county, the same being a court of record, do hereby certify that Alfred C. Vinton, Esq., whose name is subscribed to the proof or acknowledgement of the annexed instrument in writing, was at the time of taking such proof or acknowledgment a justice of the peace in and for the said county, duly commissioned, sworn, and authorized to take the same; and, further, that I am well acquainted with his handwriting and verily believe that the signature to the said proof or acknowledgment is genuine; and, further, that the annexed instrument is executed and acknowledged according to the laws of said Commonwealth.

[SEAL.] Witness my hand and the seal of the supreme judicial court of the said Commonwealth for this county this twenty-ninth day of March, A. D. eighteen hundred and eighty-seven.

JOHN NOBLE, *Clerk.*

14 EXHIBIT "A."

Home Benefit Association of New York, N. Y.

Life Department.

Certificate No. 5822. Amount $5,000.

In consideration of the representations and agreements made in the application herefor, and which is a part of this contract, and of each of the statements made therein, which, whether written by his own hand or not, every person accepting or acquiring any interest in this contract, hereby adopts as his own, admits to be material and warrants to be full and true, and to be the only statements upon which this contract is made; Edward F. Hall, Jr., of San Francisco, State of Cal. is an accepted member of the life department of The

Home Benefit Association, subject to all the requirements as hereinafter stated, and for the benefit of Henrietta P. Sargent, wife of W. S. Sargent (sister) or if the said member should survive the beneficiary last named herein then for the benefit of said member's legal heirs.

Within ninety days from the receipt of satisfactory evidence to the association of death of the said member, during the continuance of this certificate in force, there shall be payable to the said beneficiary or beneficiaries, the sum of five thousand dollars, from the benefit fund of the life department of said association at the time of said death, or from any moneys that shall be realized to the said fund from the next assessment to be made as hereinafter set
15 forth, and no claim shall be otherwise due or payable.

The said member is required to pay the sum of fifteen dollars, as an expense fee, and a like sum anually, on or before the day of the month in which this certificate is dated; also the amount of one mortuary assessment within sixty days from the date of this certificate and thereafter within thirty days from the first week day of the months of February, April, June, August, October and December of each and every year during the continuance of this certificate (or from such other periods as the board of directors may from time to time determine), the amount of one mortuary assessment according to the rates stated hereon; and this certificate shall not be binding upon the association unless the said sum or sums have been actually paid to the association, and during the lifetime of said member.

This certificate is subject also to the following conditions:

I. If this certificate, or any continuance thereof, has been or shall be obtained through misrepresentation, fraud or concealment, or if any attempt shall be made, by false swearing or suppression of any material fact on the part of the beneficiary, to obtain any sum under this certificate, then the same shall be absolutely void.

2. Death of the member by his own hand or act, whether voluntary or involuntary, sane or insane at the time, is a risk not assumed by the association under this contract and this certificate shall be void if the said member shall die in, or in consequence of, a duel, or by the hands of justice, or in violation of, or attempt to vio-
16 late, any criminal law of the United States, or of any State or county in which the member may be; or when death may have happened in consequence of war or invasion or any other voluntary exposure to unnecessary danger, hazard or perilous adventure, or while the member was employed in mining, blasting, or wrecking, railroad or steamboat service, as engineer, fireman or brakeman; or in the manufacture and transportation of gunpowder or other explosive substances, and the benefit shall not be held to extend to mysterious disappearances.

3. Whenever the said benefit fund is insufficient to meet an existing claim by death, an assessment shall then be made upon every member of the said life department at the time of the death. Assessments shall be graded as follows, for each $1,000. benefit, according to the age of the member when levied; provided, however, no

assessment shall be made when the amount of money in the benefit fund exceeds the amount of one assessment on all the members.

Under 20 years of age	$0 70	40 to 45 years of age	$1 30
20 to 25 " " "	80	45 to 50 " " "	1 70
25 to 30 " " "	90	50 to 53 " " "	2 10
30 to 35 " " "	1 00	53 to 56 " " "	2 50
35 to 40 " " "	1 15	56 to 58 " " "	3 80

58 to 60 years of age	$3 30
60 to 62 years of age	3 80
62 to 64 years of age	4 40
Over 64 years of age	5 00

4. A printed or written notice directed to the post office address of the member as it appears on the books of the association,
17 and deposited in the post office, postage prepaid, shall be sufficient notice of any assessment levied, and failure to renew this membership by payment of such assessment within thirty days from date of levy shall forfeit all claim upon the association from the date of the levy of such assessment.

5. No payment of annual fee or assessment shall be binding upon the association unless paid at the home office, or to an agent holding written authority to receive the same, over the signature of the president and secretary. No agent has power, in behalf of the association, to make or modify any of the terms of this certificate, to extend the time for paying the dues or assessments, or to bind the association by any promise, or by receiving any information or representation.

6. Membership will be forfeited should the member become habitually intemperate, or engage in a more hazardous occupation than that named in the application, without its written consent, or otherwise fail to comply with the requirements herein stated.

7. The said member may travel anywhere in the settled portions of the United States and its territories (except in localities where yellow fever is prevailing at the time as an epidemic), and in the British provinces; make the passage along the coast thereof; and may go to, return from and travel in Europe, the Sandwich Islands, and the West Indies, between the months of November and May inclusive.

8. Proofs of death must be furnished to the association
18 within one year after death, and must contain full answers under oath to the questions in the association blank furnished for that purpose. The omission of any of the answers or statements required must be satisfactorily explained, and supplied by other proofs.

9. This association will not take notice of any assignment of this certificate until a duplicate or certified copy thereof shall be delivered to the association at its home office, and under no circumstances will the association assume any responsibility for the validity of such assignment. An insurable interest must be shown by all claimants at the time of claim hereunder, and any claim by creditor as beneficiary or assignee shall not exceed the amount of the

actual *bona fide* indebtedness of the member to him, together with any payments made to the association under this certificate by such creditor with interest at six per cent.

10. The entire contract contained in this certificate and said application, taken together, shall be construed only according to the terms thereof and the laws of the State of New York, the place of this contract being expressly agreed to be the home office of the said association in the city of New York; and elsewhere than the said State no suit or proceedings at law, or in equity shall be brought or prosecuted, except in the circuit or district court of the United States; and the said association shall not be liable, nor shall any suit or proceedings be brought, after the lapse of one year from the date of the death of said member.

In witness whereof, the Home Benefit Association has
19 caused this certificate of membership to be signed by its president and secretary, and its seal to be affixed hereto, at
[L. S.] its office in the city of New York, this fifth day of September, 1885.

J. C. BARNES, *President.*
A. S. BROWNELL, *Secretary.*

Compared B.

CITY & COUNTY OF NEW YORK, *ss.:*

APRIL 5, 1887.

I hereby certify that the above copy is a true copy of the policy or certificate referred to in foregoing complaint.

SHERMAN MOULTON,
[SEAL.] *Notary Public, N. Y. Co.*

(Endorsed:) United States circuit court. Henrietta P. Sargent, plaintiff, against The Home Benefit Association of New York, N. Y., defendant. Complaint. Moulton, Johnson & Levy, attorneys for plaintiff, 154 Nassau street, Tribune building, New York city. U. S. circuit court. Filed Apr. 5, 1887. Timothy Griffith, clerk.

20 Circuit Court of the United States, Southern District of New York.

HENRIETTA P. SARGENT, Plaintiff,
against
THE HOME BENEFIT ASSOCIATION OF NEW YORK, N. Y., Defendant.

The Home Benefit Association of New York, the defendant in the above-entitled action, by Francis Lawton, its attorney herein, answers the complaint as follows:

First. Defendant has no knowledge sufficient to form a belief as to the truth of the allegations contained in the first paragraph of said complaint, and therefor- denies the same.

Second. Defendant admits the allegations contained in the second paragraph of said complaint.

Third. Defendant admits the allegations contained in the third,

fourth, and fifth paragraphs of said complaint, except that it demands the production of the certificate or policy of insurance, of which Exhibit "A," to said complaint annexed, purports to be a copy, and it denies all the allegations of the complaint as to the tenor and effect of said certificate or policy, so far as the same may vary or depart from the contents of said certificate or policy when produced.

Fourth. Answering the allegations contained in the sixth paragraph of said complaint, defendant admits that the said Edward F. Hall, Jr., paid to this defendant all the sums of money and
21 assessments stipulated for, but defendant denies that said Edward F. Hall, Jr., performed all the conditions mentioned in said certificate or policy which were therein stipulated he should perform.

Fifth. Answering the allegations in the seventh paragraph of said complaint contained, defendant admits that on or about the 19th day of October, 1886, the said Edward F. Hall, Jr., departed this life at the city of New York, but defendant alleges that the death of said Edward F. Hall, Jr., was caused by one of the causes excepted from the operation of this certificate or policy—that is to say, the certificate sued on herein was issued by the defendant and accepted by said Edward F. Hall, Jr., upon the following expressed condition and agreement made between the said Edward F. Hall, Jr., and this defendant, which constituted part of said certificate, viz: "Death of the member by his own hand or act, whether voluntary or involuntary, sane or insane at the time, is a risk not assumed by the association under this contract;" and defendant, further answering, says that the death of said member, Edward F. Hall, Jr., was brought about by his own hand and act, in that said Edward F. Hall, Jr., died from the immediate effect of a shot from a pistol fired by his own hand, such shot having been so fired by him with the intention of taking his own life.

And defendant denies that the plaintiff thereafter furnished to the said association satisfactory proofs of the death of said Edward F. Hall, Jr., or that she has performed all the conditions contained in said certificate or policy which are therein required to be performed by her.

22 Fifth. Answering the allegations in the eighth paragraph of said complaint, defendant says that more than ninety days have elapsed since certain alleged proofs of death were delivered by the plaintiff to the defendant and payment demanded, but denies that any payment of any sum whatever is due from defendant to said plaintiff.

Sixth. Defendant has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in the ninth and tenth paragraphs of said complaint, and therefore denies the same.

Lastly. Defendant denies the allegations contained in the eleventh paragraph of said complaint.

Wherefore defendant demands the judgment of this court that the said certificate or policy be declared void and be surrendered

for cancellation, and that the complaint be dismissed and the defendant recover its costs herein.

FRANCIS LAWTON,
Attorney for Defendant.

CITY AND COUNTY OF NEW YORK, *ss.:*

Andrew S. Brownell, being duly sworn, deposes and says that he is the vice-president of The Home Benefit Association of New York, the above-named defendant, and is familiar with the affairs of said defendant; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge except as to matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

ANDREW S. BROWNELL.

23 Sworn to before me this 21st day of May, 1887.

JOHN JENKINS, JR.,
[SEAL.] *Notary Public, N. Y. Co.*

(Endorsed:) Circuit court of the United States, southern district of New York. Henrietta P. Sargent ag'st The Home Benefit Association of New York, N. Y. Answer. Francis Lawton, attorney for defendant, 170 Broadway, N. Y. U. S. circuit court. Filed May 21, 1887. Timothy Griffith, clerk.

24 United States Circuit Court, Southern District of New York.

HENRIETTA P. SARGENT, Plaintiff,
against
THE HOME BENEFIT ASSOCIATION OF NEW YORK, N. Y., Defendant.

We hereby consent that Miron Winslow, Esq., be substituted in our place and stead as attorney and counsel for the plaintiff in the above-entitled action.

Dated New York, March 5th, 1888.

MOULTON, JOHNSON & LEVY,
Attorney- for Plaintiff, 120 Broadway, New York City.

(Endorsed:) U. S. circuit court, southern district of New York. Henrietta P. Sargent ag'st The Home Benefit Association of New York. Consent for substitution of attorney. U. S. circuit court. Filed Mar. 5, 1888. Timothy Griffith, clerk.

25 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Saturday, the second day of June, in the year of our Lord one thousand eight hundred and eighty-eight.

Present: The Honorable Alfred C. Coxe, circuit judge.

HENRIETTA P. SARGENT
against
HOME BENEFIT ASSOCIATION.

The action being at issue on the pleadings and having been tried on the 6th, 7th, and 8th days of February, 1888, before the court and a jury, and the jury having rendered a verdict for the plaintiff for the sum of five thousand three hundred and fifty dollars, and the judge presiding at the trial aforesaid at the same term having entertained a motion made on his minutes on behalf of the defendant to set aside the said verdict and for a new trial to be granted upon the exceptions taken on behalf of the defendant at the trial, and after hearing Austen G. Fox, Esq., on behalf of the defendant, in support of said motion and Osborne E. Bright, Esq., on behalf of the plaintiff, in opposition thereto, on motion of plaintiff's attorney it is—

Ordered that the defendant's said motion be, and the same hereby is, overruled and denied, and it is further ordered that the plaintiff have judgment on the verdict heretofore rendered in her favour.

ALFRED C. COXE.

26 (Endorsed:) U. S. circuit court, southern district of New York. Henrietta P. Sargent against Home Benefit Association. Order denying motion for new trial. Miron Winslow, plaintiff's attorney, 120 Broadway, N. Y. city. U. S. circuit —. Filed June 4, 1888. John A. Shields, clerk.

27 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Monday, the sixth day of February, in the year of our Lord one thousand eight hundred and eighty-eight.

Present: The Honorable Alfred C. Coxe, judge.

HENRIETTA P. SARGENT
vs.
THE HOME BENEFIT ASSOCIATION OF NEW YORK.

Now comes the plaintiff, by Moulton, Johnson & Levy, her attorneys, and moves the trial of this cause. Likewise comes the defendant, by Austen G. Fox, Esq., its attorney. Thereupon a jury is empaneled and the cause proceeds to trial. After hearing the evidence of the parties, the argument of counsel, and the instructions of the court, on February 8, 1888, the jury retire, and on their return render a verdict whereby they find for the plaintiff in the amount of $5,350.

It is ordered that the defendant have a stay of all proceedings on said verdict for forty days from February 8, 1888, within which to prepare and serve a case herein, with leave to turn the same into a bill of exceptions.

JOHN A. SHIELDS, *Clerk.*

28 United States Circuit Court for the Southern District of New York.

HENRIETTA P. SARGENT, Plaintiff,
against
HOME BENEFIT ASSOCIATION, Defendant.

This action coming on for trial before the Honorable Alfred C. Coxe and a jury, at a jury term of said court, held in the United States court-house, in the city of New York, on the 6th, 7th, and 8th days of February, 1888, and the issues therein having been duly tried, and the jury having rendered a verdict for the plaintiff for the sum of five thousand three hundred and fifty dollars on said 8th day of February, 1888, and the costs herein having been duly taxed by the clerk of this court on the 29th day of June, 1888, in the sum of forty-three dollars and seventeen cents: Now, on motion of Miron Winslow, attorney for the plaintiff—

It is ordered and adjudged that the said plaintiff, Henrietta P. Sargent, recover of the defendant, Home Bebefit Association, five thousand three hundred and fifty dollars, found by the jury as aforesaid, with one hundred and twenty-four dollars and eighty-two cents interest on the amount of said verdict from the day in which it was rendered to the date of the entry of this judgment, as computed by the clerk of this court, and forty-three dollars and seventeen
29 cents costs taxed by the clerk of this court as aforesaid, making in all the sum of damages, interest, and costs five thousand five hundred and seventeen dollars and ninety-nine cents.

Judg't signed this 29th day of June, 1888.

JOHN A. SHIELDS, *Clerk.*

(Endorsed:) Circuit court of the United States for the southern district of New York. Henrietta P. Sargent *vs.* Home Benefit Association. Judgment. Miron Winslow, pl'ff's att'y. U. S. circuit —. Filed June 29, 1888. John A. Shields, clerk.

30 United States Circuit Court, Southern District of New York.

HENRIETTA P. SARGENT
against
HOME BENEFIT ASSOCIATION. } Bill of Exceptions.

This action was commenced in the circuit court of the United States for the southern district of New York, on the 29th day of March, 1887, by the service of a summons upon the defendant; issue was joined by the filing in the clerk's office of said court and of service upon the plaintiff of the defendant's answer on or about the 21st day of May, 1887.

This action was called for trial before the Honorable Alfred C. Coxe, judge, at a jury term of said court, held in the United States court-house, in the city of New York, in said circuit, on the 6th day of February, 1888.

Miron Winslow and Osborne E. Bright, Esquires, appeared for the plaintiff.

Francis Lawton and Austin G. Fox, Esquires, appeared for the defendant.

Counsel for the plaintiff opens the case.

31 HENRIETTA P. SARGENT, the plaintiff, being sworn, testifies as a witness in her own behalf as follows:

By Mr. BRIGHT:

I am the plaintiff in this action. I reside in West Medford, Massachusetts, and have resided there for nineteen years; my home and homestead is there.

I knew Mr. Edward F. Hall, Jr., in his lifetime; as I understand, he died on October 19th, 1886, in the city of New York.

I was then at my home at West Medford; Mr. Hall was my brother; he lived in New York; he had previously lived in San Francisco for over twenty years; he had large interest- there, and carried on business there all the years he was there.

I know that he had a strong attachment for San Francisco.

(A paper handed to witness.)

I received this paper; I think it was two years ago last June.

I loaned him five thousand dollars and took this as security. It was my brother's wish and arrangement that I should receive this policy as security for that loan.

(It is conceded that the policy referred to is a policy issued by the defendant company on the life of Edward F. Hall. Mr. Bright offers said policy in evidence, and it is marked "Plaintiff's Exhibit No. 1.")

The sum of five thousand dollars was still due when my brother died, and still continues unpaid. My brother was buried in
32 the family vault at Mt. Auburn, Cambridge, Massachusetts, on 22nd October, 1886. I witnessed the burial; he was buried from my house; he was two years younger than myself.

Cross-examination.

By Mr. FOX:

I knew Mr. Moulton who died lately. He was the only gentleman who represented me as agent or attorney in the matter of prosecuting the claim against the company. During all the time from the death of my husband up to the beginning of the action, no one else except himself or his firm of Johnson, Levy & Moulton represented me; they represented me as my agents.

Q. And you mean to say that also in the matter of preparing the so-called proofs of death, you remember that?

A. Yes; the whole matter was entrusted to them alone; I had no other counsel here at that time.

(Paper shown to witness.)

The letter you show me is in the handwriting of my brother.

(Said letter is marked "Defendant's Exhibit A, for identification.")

Plaintiff rests.

(Counsel for defendant moved the court to direct a verdict for the defendant upon the ground that the plaintiff has failed to show that she has ever presented to the defendant satisfactory evidence of
33 the death of Edward F. Hall, or has presented any evidence of his death, the policy of insurance containing very specific provisions as to the facts which are required to be proven and the manner in which they are to be proven.)

The court refuses so to do; to which refusal the counsel for the defendant duly excepts.

Mr. Fox opens the case for the defendant.

EUGENE A. BAKER, sworn and examined as a witness for the defendant, testifies as follows:

By Mr. FOX:

I am secretary of The Home Benefit Association, the defendant, and have been for two years. I received the proofs of death furnished to the company in the case of Henrietta P. Sargent against the defendant company; I have the proofs with me, and I now produce them.

(Counsel for defendant offers in evidence notice to produce, dated January 10th, 1888. It is marked "Defendant's Exhibit B.")

Those papers were handed to me at the first instance when they came to the company; the report of the coroner's inquest was handed to me. The card which is now attached to the papers was on them then. I identify Mr. John Sherman Moulton, the gentleman who sits there at the table of plaintiff's counsel, and next to Mr. Bright, to be the person who handed them to me; he gave me those papers.

34 (The following papers produced by the witness are marked Card of plaintiff's attorneys is marked "Defendant's Exhibit B, for identification;" coroner's inquest and affidavits are marked "Defendant's Exhibit C, for identification;" proofs of death are marked "Defendant's Exhibit D, for identification.")

Cross-examination by Mr. BRIGHT:

I am employed by the defendant at their office, and it was my province and usual duty to receive papers of the character handed to me by Mr. Moulton and to act upon them.

At this stage of the proceedings the court was adjourned to February 7th, 1888, at 11 o'clock a. m., at which time the case was continued as follows:

ANDREW S. BROWNELL, sworn and examined as a witness for the defendant, testified as follows:

By Mr. FOX:

I reside at Yonkers. I am now connected with the Home Benefit Association as a director. I was formerly an active officer, but am

not now. When an officer I held the position of secretary, and for the last two years of vice-president. I was secretary in the year 1885.

Q. I show you a paper purporting to be an application for a certificate of membership in the Home Benefit Association, dated August 27, 1885, and ask you if that is the application which was filed for the issuing of the policy here in suit to Henrietta P. Sargent?

35

A. It was.

(Said application is offered in evidence and is marked "Defendant's Exhibit E.")

Q. Did you know the late Charles W. Moulton, who acted as agent or attorney for Mrs. Sargent in presenting proofs of death in this case?

A. I knew him by his calling and introducing himself at our office and representing himself as Mrs. Sargent's agent in connection with this claim. I had no other acquaintance with him. He so introduced himself to me in connection with this claim at the office of the Home Benefit Association in this city. That was after the death of Mr. Hall and before the suit was begun.

Q. I show you two papers, marked respectively Defendant's Exhibit C and D for identification, and ask you whether any other proofs of death except these have been presented to the association on the claim of Henrietta P. Sargent, or if those are the only proofs so far as you know?

A. Those are the complete proofs, I believe, and the only ones.

Mr. Fox: I offer in evidence Defendant's Exhibit C for identification; Defendant's Exhibit D for Identification; also the letter identified by Mrs. Sargent and marked Defendant's Exhibit A for identification.

36

By Mr. Bright:

Q. Was this paper which is called "proofs of death" and which I believe is marked "Exhibit D for identification" delivered to your company on December 4th, 1886?

A. I cannot say.

Q. Will you look at that and state whether from any endorsement upon it you can say when it was received by your company?

A. I cannot say when this paper shown to me was received by our company. The endorsement upon it, "Received December 13th," is mine. I suppose that I made it upon that day. I do not suppose that I received the paper upon that day. I certainly received it prior to the 13th of December. It was received, I should say, about a week or ten days prior to the date of the memorandum on the back. It might have been ten days or two weeks, but about a week or ten days. I do not know exactly; a week to ten days; I cannot fix the time.

Q. This other paper that I have identified and which has been marked "Defendant's Exhibit C for identification"—

— My impression is—and I get it from the memorandum—that I received it on December 13th.

Q. Your impression is that you received it on December 13th?

A. I judge so, from the endorsement I have made on it. That is my best recollection.

By Mr. Fox:

Q. Can you fix approximately the date of your conversation
37 with Mr. Moulton when he came as agent for Henrietta P. Sargent with regard to this claim—the month, for instance?

A. It must have been in November—I should say from the 15th to the 20th—in the year 1886. I have no memorandum and no absolute recollection. That was the occasion on which he stated that he came on behalf of Mrs. Sargent, the plaintiff here. I can give the substance of the conversation at that time with Mr. Moulton—what he said to me and what I said to him.

Q. Will you please state the substance of that conversation?

(Objected to as immaterial. Question excluded; to which ruling defendant duly excepts.)

Cross-examination by Mr. BRIGHT:

I should think I knew of Mr. Hall's death as a fact about a week or ten days after it occurred. Our company has no San Francisco connection or branch.

Dr. JOHN R. CONWAY, Jr., being sworn and examined as a witness for the defendant, testified as follows:

By Mr. FOX:

I am a physician and surgeon, practicing in the city of New York. I have been connected with public institutions and hospitals in this city. I have been in the Chambers-street hospital and house surgeon in Bellevue hospital, and I have been connected with the Post Graduate Medical school for three years.

I remember being called to No. 137 East 21st street in October, 1886. I went there and found a gentleman named Mr. Hall lying
38 on a bed in a room on the fourth floor of No. 139—in a back room. There are two houses together. He was unconscious.

On examining him I found that there was a wound on the right side of his head. He was lying on his back, towards the right side of the bed, and his hands were lying by his side, and the clothing was pulled pretty well up over his chest, nearly up to the armpits. It was just lying smoothly pulled over the chest and both hands were lying outside of the clothing, and the right hand had right near it, within a few inches or maybe nearer, a pistol. There was a great deal of blood flowing from the wound at the time I saw him, and a considerable had flowed before I saw him, so that the pillow was pretty well stained with blood, and it had flowed down along the right side of the body and collected in a pool beneath his back. I made examination of the wound. The wound was in the right side of the head, a little bit back from the skin where the

hair is absent, and involved partly that and partly where the hair is and the temple, and there was considerable laceration of the part of the soft tissues. On examining I found that there was brain matter and blood flowing from the wound, and the bone was very much fractured all around that side of the head. On examining still closer on the other side of the head I found a fracture directly opposite in the left temple, so that when you took the forehead in the hand you could feel that it was loose and that the bone was considerably comminuted on both sides of the head. I have had considerable experience at Bellevue hospital in gun-shot wounds.

There was so much laceration and so much blood that I did not take particular notice that there was powder there. I do not
39 remember of there being powder. There may have been, but I do not remember. I did not see it, as far as I can remember. The laceration and the amount of comminution indicated that the pistol was held very close. Comminution means the fracture of the bone in several small pieces or a number of pieces.

Q. And you mean that the bone on the right-hand side was broken into small pieces?

A. There were some loose pieces, and besides that the fissure extended—the lines of fracture (and there were several of them) extended in different directions across the head.

There was a letter lying on a table in the room. I think I will be able to identify it if it is shown to me.

(Defendant's Exhibit A, for identification shown to witness.)

That is the letter.

(Said letter is received in evidence and marked Defendant's Exhibit A.)

Cross-examination by Mr. BRIGHT:

This house was on the north side of the street. My father is the owner. The room was in the rear. It was the northeast corner of the house. It was shortly after seven o'clock in the morning or about that time when I got there. I do not remember accurately; some time about seven o'clock or directly after. I do not think that I was the first person there. I was the first physician. It is my memory now that it might have been from seven to seven-thirty. I do not remember accurately; it might have been before seven. I do not think it was as late as 7.30.

40 There was a door in the room leading out into the hallway. The door entered the west end of the room, the southwest corner. The bed was placed against the east wall, the head against the east wall, about the center of the room. A person could not walk around the head. They could walk around the foot and side. The head was against the east wall. This letter was on the table when I saw it. There was writing material there, I believe. I cannot answer positively, but I believe there was; am not certain. I cannot say that Mr. Hall had evidently been recently engaged in writing. All that I saw was a letter there. I knew Mr. Hall by

sight. I had met him several times. I believe that I talked with him several times in a casual way. He knew who I was. I had not particular acquaintance with him. I found Mr. Hall lying in his bed, with a wound at or near the right temple; lying on his back, with his limbs stretched out; composed, his arms stretched out and composed. The hand was relaxed. I do not remember that both hands were relaxed. I only noticed the one that the pistol was near particularly. It was the right hand I noticed. The right hand I know was relaxed and composed. There was a pistol within a few inches of his right hand. I think I have described all that I noticed. I believe that I noticed the smell of powder in the room when I first went in, and remarked it—recently-discharged powder. My memory is not very good on that point, but I have that recollection, that I believe that I did. My memory on that point is not very good; it is an impression. It is a fact that I associated that pistol with his wound, and my operations of mind were based
41 upon that assumption. I noticed no burning of the skin nor of the hair. I do not remember noticing any. I am a physician of five years' standing. I observed the fracture of the skull by the action of it under my hand when placed upon the crown and by examining the wound directly and by examining the opposite side of the head. There was not any hole on the opposite side of the head.

Q. Do you know whether anything—and, if so, what—had penetrated that skull of your own knowledge?

A. No. I did not probe the wound; it was not necessary. I do not remember how long he remained in the house and in his own room. My consent had nothing to do with Mr. Hall's removal to an undertaker's shop. It was done with my knowledge, not with my consent, for I had nothing to do with it. The houses were rented, and I had nothing to do with the houses at that time. There was a tenant in them. I was merely called as a physician to see Mr. Hall. I did not see any coroner's jury there. I was not examined before a coroner's jury. Dr. Jenkins has the pistol; I saw it yesterday. The slug that it discharges is, I should judge, about thirty-eight calibre; a very large slug. There was much laceration of the wound. The direction of the laceration varied. It went every which way—up, down, and around. It varied up and down—both. The immediate and instantaneous effect upon a person's consciousness from receiving a slug discharged from a thirty-eight-calibre pistol into his brain would be instant unconsciousness. I examined the pistol; I noticed that it had a light colored handle
42 and was a pistol of the calibre I have mentioned. I did not examine the barrels or the cartridges. I do not remember doing it. I do not remember what was the condition of the barrels.

Q. You do not know whether any of the barrels were smoky or smutty?

A. I do not remember examining it. I do not remember whether any barrel presented signs of recent firing.

Q. Did you have any conversation with Mr. Sherman Moulton after this event?

(Objected to as not proper cross-examination and as irrelevant. Question allowed; to which ruling counsel for the defendant duly excepts.)

A. I saw Mr. Moulton and conversed with him. I said to him that I could not positively identify the pistol and that I did not examine it; I told him that I saw it lying on the bed when I first saw it and afterwards put it on the table myself.

Q. Did you state to Mr. Moulton that you did not examine the pistol, that you would not be able to identify it, and that you saw it on the bureau or in the bureau drawer; did you state that precisely?

A. I do not remember that precisely. I do not remember making those exact statements. I know that I told him I would not identify the pistol positively. I know the general appearance and the size, but I could not identify the pistol positively.

Q. And that is all that you remember of the whole conversation with Mr. Moulton on that subject?

43 A. I think I told him that it had some initials on it, but I was not even certain on that point, because my memory about the pistol was very poor—about the exact appearance of it.

Redirect examination by Mr. Fox:

I did not see any other pistol there except this one. This pistol as it lay on the bed was almost touching the right hand of Mr. Hall. I made a statement to the coroner's physician. The statement shown me, purporting to be sworn to by me on the 20th day of October, 1886, was made by me. That is my signature.

(Said paper is marked Defendant's Exhibit H for identification.)

Q. Mr. Bright asked you whether there was a hole in the left-hand side of the head, and you said there was no hole. Describe accurately to the jury exactly what there was on the opposite side and how nearly that was to being directly opposite to the wound on the right side.

A. Almost directly opposite. You could feel through the scalp that the bone was comminuted or broken in peices. I did not probe that wound because it was evident that Mr. Hall was dying at the time; he would be dead in a very few minutes. The probing would do no good, and it is not usually made in such very extensive wounds of the brain. There was no other mark or injury or violence to Mr. Hall's person except the bullet hole in his head that I saw. The wound of the brain was sufficient to produce death. I saw no other weapon or implement then except the pistol lying near his hand.

By Mr. Fox:

44 Mr. Bright has asked you whether the hair was burned by the discharge of the power or whether you could distinctly see any powder on the skin, and you said that you could not.

A. I said that I did not remember.

Q. You said that you could not state.

A. That I could not state.

Q. State whether there was any blood about that part of the head, and whether that would have been sufficient to prevent your discovering any such indication.

A. There was blood and lacerated tissue—tissue badly torn—that would have obscured the burning of the hair to some extent if it had been burned. I may have noticed it at the time, but I do not remember whether I did or not. As to the powder, the blood being over the head would tend to obscure it, of course. The pistol was almost touching his fingers, but a few inches from his hand.

By Mr. BRIGHT:

The handle of the pistol was a few inches from the clasp of his hand, but the fingers lay almost around it and almost touching it; that is what I mean—that the hand had just relaxed and dropped the pistol.

By the COURT:

Q. That is, you had the palm of the hand in mind rather than the fingers?

A. Yes; it was a few inches from the palm of the hand.

By Mr. BRIGHT:

I recall Mr. Winslow and yourself calling upon me and asking me to give a narration of those events. I said it was several inches from his hand; just in the same way as I have stated here. I did not say that his hand was lying open and relaxed, and that the pistol was several inches from the extended fingers—from his hand I said. I do not remember saying as to his fingers. I knew nothing of the previous medical history of Mr. Hall. I do not remember accurately to the minute or within a quarter of an hour even what time it was when I came to Mr. Hall's house that morning. I did not look specially about the room for any other weapon or instrument that might have produced that wound. I do not remember whether I sponged away the wound or not, but I used a compress. A compress would absorb the blood. I do not remember whether I sponged it. I have no distinct recollection of any appearance of burning with powder upon or around that wound.

By Mr. FOX:

I myself took the pistol from the bed and placed it on the table or bureau. Mr. Hall died at 7.40 a. m.

By the COURT:

Q. Was this a boarding-house?

A. It was rented to a lady who kept it as a boarding-house—the two houses.

By Mr. FOX:

Q. You went there at the request of a servant girl from the house?

A. Some messenger came for me. I was not living there. At the time I was living at No. 14 Lexington avenue; two blocks from the place. I am not in any way connected with either the plaintiff or defendant in this case. I have no business relation with the plaintiff or defendant in any way. I am not the physician for the defendant, The Home Benefit Association, nor ever have
46 been. I have no interest in the result of the litigation.
This letter, Exhibit A, signed by Mr. Hall was lying open at the time.

By Mr. BRIGHT:

This table was in the northwest corner of the room, about five or six feet from the bed.

Mr. FOX: I now offer in evidence the proofs of death.

(Paper heretofore marked "Exhibit D for identification" and "Exhibit C for identification" are admitted and marked "In evidence.")

By Mr. BRIGHT:

That affidavit (paper shown witness) was sworn to by me October 20th—I do not remember the date; I suppose it was sworn to by me on that day. I do not remember in whose presence I signed and swore to it.

LIZZIE SPEC, being sworn and examined as a witness for defendant, testified as follows:

By Mr. FOX:

I live in 28th street, New York. I did live at 139 East 21st St.; that was the house in which Mr. Hall lived. I was working then at service. I knew Mr. Hall. I saw him shortly before he died; he was in his bed. I had been attracted by a noise, another girl calling me. Then I went into the room. Nothing had happened to Mr. Hall that I could see, only a little blood came out of his mouth on the right side. I saw some blood on the right side of his face.
Nobody was in the room except Mr. Hall. I came right out.
47 There was a girl in the hall. She called me and hollowed for help. I first went for the doctor; the doctor lived next door; I do not know his name. He was not in. Then I went for Doctor Conway. I requested Dr. Conway to come to the house, and he did so. I don't know whether he came before or after me, but we went in at about the same time. The day before Mr. Hall died I had seen him about the house. He had had conversation with me about this condition. He complained of a headache very often. He had lived in the house some time before he died. He was there about nine months, and then left there; he left there and came back again. I was frightened, but I saw how Mr. Hall was lying—on his back. Then I went right away.

Cross-examination by Mr. BRIGHT:

I was employed in the house where Mr. Hall had lived some time. I knew him and knew Mrs. Hall. I knew something of him. He was a pleasant gentleman. I was on the second floor when I heard the girl call. I did not hear any pistol shot. A nurse girl belonging to a lady in the house halloaed and said there was somebody calling for help, and that caused me to go. She was in the hall. I do not know where she came from. She did not mention Mr. Hall's name. She said somebody called for help up there. I said, If somebody called for help why don't you see? I saw her after that; she came right by me as I went into the room; she was right by me when I went into the room. The door was open about that much (indicating). I heard no pistol shot. The girl was on the same floor with Mr. Hall, where Mr. Hall was when she called to me, and,
48 being on that floor, she called out to me that somebody was calling for help, and I went right upstairs, and she was near me when I was about to enter the room; the door was open and I went in far enough to see that Mr. Hall was in distress. I saw the blood. I saw that he was dying. I did not see any pistol till I came back from the doctor's; there was quite a crowd in the room when I came back, and then I saw the pistol for the first time. Dr. Conway took it up off the bed—off of the spread—and looked at it. He picked it up on the right-hand side and looked at the gentlemen, and I don't know what he said. I do not know what he did after looking at it. I did not look more after that. A number of persons were in the room before Dr. Conway got there. I did not see the wound. I did not see the side of his head; I did not look at it. I could have seen it, but I did not look; it was too painful for me to look.

GERTRUDE GRAHAM, sworn and examined as a witness for defendant by Mr. FOX, testified as follows:

I live at Morristown, New Jersey. I was living in the house in which Mr. Hall was at the time of his death. It was a boarding-house under the control of Mrs. Munroe at the time the accident happened; I mean the time that Mr. Hall was found with a wound in his head. Mr. Hall had been in the house for some time before he died. I would see him from time to time. Sometimes three or four days would elapse when I would not see him. I frequently heard Mr. Hall complain of having headache and pain in his head, and that he was very much distressed. He described it as a
49 severe pain. He did not call it headache exactly; he said pain. This happened several times; a good many times.

A day or two before he met his death he was quite ill and had medicine come to the house, and he said that he had a very severe pain in his head and was suffering terribly with it. I don't remember whether it was a day or two days before he died.

I think I did not go into his room before Dr. Conway arrived. I think I entered the room about the time that Dr. Conway entered. I think Mr. Hall was rather composed and everything was orderly

on the bed—the clothing straightened and quite composed, his hand lying down, one hand. I did not notice the other hand. I noticed one hand lying down and partially across him. I think the bedclothes were rather smooth across his chest, as nearly as I can remember. He was lying down in the bed. I cannot say whether he was dressed. I saw a pistol lying on the bed and very near his hand, the right hand.

Cross-examination by Mr. BRIGHT:

I knew Mr. Hall four or five months. I did not talk with him on many occasions. He was in and out of the house; sometimes he would be a week or two there, and then absent. I saw very little of him. I was his landlady during the summer. I should say he was rather irritable and nervous; otherwise agreeable. I was on perfectly good terms with him. I do not know who had been in the room before I got there. I got there about the same time that Dr. Conway got there. I did not hear any pistol shot.

50 When I got there, about the time that Dr. Conway got there, he was lying back composed and with one hand across him, and, as near as I can remember, the hand was open; that was the right hand; not exactly across him, but lying partially across him and partially down.

I cannot tell you what was the distance between the pistol and his right hand; my best recollection is that it was perhaps a couple of inches. My best recollection of the distance between the pistol and his right hand was a couple of inches; perhaps more; I do not think it was any distance from the pistol. I think that it lay in a kind of diagonal or crosswise position as near as I can remember. I did not observe the wound; there were one or two other persons in the room when I went in, but I cannot remember who they were. I was in the lower part of the house, in the front basement, when one of the girls called to me.

Dr. JOHN R. CONWAY, Jr., recalled and examined, testified as follows:

By Mr. FOX:

Mr. Hall had a night shirt on.

By Mr. BRIGHT:

I do not think I was ever at the coroner's office in relation to the death of Mr. Hall. I was never before any jury summoned or held by the coroner and knew of no such. (Mr. Bright then read the affidavit of the witness purporting to be sworn to October 20th, 1886, before John R. Nugent, for Ferdinand Levy, coroner). The statements made in that paper were made wholly and only on the observations which I have detailed to the jury this morning.

51 Mr. Fox then proceeds to read for the defendant the testimony of RALPH C. JOHNSON, taken by deposition, on behalf of the plaintiff, who testifies as follows:

I am sixty-seven years of age; have retired from business, and reside at 37 East 87th street, New York city. I was acquainted with Edward F. Hall, Jr., during his life, and he was with me at my apartments, which were then at 105 East 57th street, the night before his reported death. My daughter, Miss Bessie, Miss Pauline Olmstead, and my wife were present besides myself. During the evening Col. John Williard called. After Mr. Hall had been there a while the young ladies, Mr. Hall, and myself left the parlor and went into the dining room; my wife remained in the parlor with Col. Willard. While in the dining room Hall complained of very severe pains in his head, holding up his hands to his head, and saying he felt very badly. Then I made a punch and we had some other refreshments, and he invited me to meet him down town next day to take lunch with him, and I agreed to do so. After awhile, about half-past ten, he left the house with Col. Willard. He was holding his hands to his head quite a time in the evening.

Mr. Fox then proceeds to read for the defendant the testimony of BESSIE JOHNSON, taken by deposition, on behalf of the plaintiff, but not read by her, who testifies as follows:

My name is Bessie Johnson; I am the daughter of Ralph C. Johnson. I was acquainted with Edward F. Hall, Jr., during his lifetime, and remember his calling on my father at the Palermo Flats on the evening of the 18th of October, 1886; he came about
52 half-past eight and stayed until about half-past nine or ten. We went into the dining room for refreshments, and at first he seemed full of fun; he complained severely of his head, and put his hands to his head often and complained of severe pains there, and, just as he was going in the dining room, he said his head ached and continued to complain of this pain in his head until he went away. I mean he mentioned it two or three times in the evening. I recollect he was more depressed later in the evening. I think he was in a depressed condition when he left.

Defendant rests.

JOHN SHERMAN MOULTON, being duly sworn and examined as a witness for the plaintiff, testifies as follows:

By Mr. BRIGHT:

I am one of the attorneys for Mrs. Sargeant, plaintiff. I was the clerk or associate of my father, the late Charles W. Moulton, during his lifetime, and have had more or less to do in the conduct of this case on behalf of Mrs. Sargeant. I have very little knowledge of the so-called proofs of death which have been produced here. I do not know how they were prepared. I knew of their service upon the company, but I did not know what they were. I delivered the so-called proofs of death to the company. My recollection of it is to a young man in the office; I think it was Mr. Baker.

The COURT: You may show that the paper purporting to be an inquest of the coroner was presented to the company.

By Mr. BRIGHT:

Q. Now, state simply with reference to this paper how it came to be presented.

53 (Objected to as irrelevant and incompetent. Question allowed; to which ruling counsel for defendant duly excepts.)

A. I went to the company and presented the proofs of loss. They then asked me if there was a coroner's verdict.

By the COURT:

I afterwards presented the coroner's verdict or the proceedings before the coroner in pursuance of a request from the company.

By Mr. BRIGHT: What occurred between you and Mr. Brownell respecting the coroner's verdict? State the occurrence and the conversation.

A. After I presented the first proofs of loss they asked me if there was any coroner's verdict. I told them at that time that I did not know.

By the COURT:

Q. Was this said to Mr. Brownell?

A. As to that I am not quite clear.

By Mr. BRIGHT:

Q. Was it at the coroner's office?

A. It was at the company's office, and it was either to Mr. Brownell or the agent who communicated with Brownell and then came back to me and told me that he said.

(Objected to by counsel for defendant unless confined to Mr. Brownell.)

A. (continued). Some one came from Mr. Brownell, because the agent told me so.

Objection overruled; to which ruling the defendant's counsel duly excepts.

A. (continued). This occurred in the early part of Decem-
54 ber. I then went to the coroner's office, as the company had asked me for the coroner's verdict, and I asked them if there had been an inquest on the body of Mr. Hall. The coroner said that it had not been made up, but he would make it up and send it to me. A couple of days after that I sent a messenger boy to the coroner's office, and it was given to him—that is, a paper was given to him, which he brought back to me in a sealed envelope. I tore it open, looked at the first page, saw the certificate of the coroner, and then looked no further, but put it in another envelope and took it to the company and delivered it to the same party to whom I had delivered the first proofs. The plaintiff did not see the inquest. To the best of my knowledge, Mrs. Sargeant was at that time at her home in West Medford. I called at Dr. Conway's house one after-

noon or morning—I have forgotten which, and I asked him what he knew about Mr. Hall—about what he knew about the pistol, and he told me that he had very little recollection about the pistol; that it was not grasped in his hand, but that it was a little ways from his hand. He did not say minutely about the distance. I saw Mr. Hall, in the last six months of his life, probably three times a week. He complained once in awhile of headache. He always appeared very jolly and pleasant. I never saw anything except that he was very pleasant, very jolly—always was with me on every occasion I ever met him. He was very pleasant in his manner. He has a son at Yale college, New Haven. He is there to-day. He was in college at the time of his father's death. I have had correspondence with him in relation to his attendance here at the trial. The
55 effort I have made to have him here is, I have written him three or four letters pertaining to this matter, and have telegraphed him. I have had some replies. New Haven is two or three hours' ride from New York.

Mrs. PHILENA MUNROE, being duly sworn and examined as a witness for the plaintiff, testifies as follows:

By Mr. BRIGHT:

In October, 1886, I resided at 137 and 139 East 21st street. I was slightly acquainted with Mr. Hall. I never met him but twice. I was residing at this place in 21st street, No. 139, at the time of his death. I did not hear any pistol shot on that occasion. I was not—at least I do not remember, being examined by the coroner. I was not examined before any jury. The paper purporting to be made at the coroner's office and sworn to by me says: "Doctor Conway, of 14 Lexington avenue, was summoned and responded shortly after, but was unable to do anything for him. It was not discovered until after the arrival of Dr. Conway that he was suffering from pistol-shot wound about the head, nor was a pistol-shot heard by any one in the house." That is true, as far as I can remember. I wanted to keep it as quite as possible, and, of course, it made me very nervous. Very few of the inmates of the house knew about it. Mr. Hall was removed from the house after his death by one o'clock, I think. The coroner was there, but no jury that I know of. The coroner, I mean, was Doctor Jenkins, a gentleman who is here, I think. I was informed by my husband that it was a
56 pistol-shot wound, and that was what I based my statement upon. The girl first informed me that this misfortune had occurred to Mr. Hall. She came running down-stairs. I told her to go for the doctor next door and if he was not in to go for Doctor Conway. I called Mr. Munroe and he immediately went upstairs and Mrs. Graham and myself went up after him. When we came to the door we were told to enter; that they thought there was something wrong there. Major Wahn, a boarder in my house, also went up. I do not think that any one entered the room till Dr. Conway arrived. I left Mr. Munroe and Major Wahn at the door and went down-stairs. A few moments after Mr. Munroe came to

me and went back. I did not see Major Wahn again until after the death of Mr. Hall. I did not see blood there. Afterwards when I went up I did not see blood. There was blood there after the body had been removed, on the wall, but that was all I ever saw there. I had it wiped off. There were only a few spots at the head of the bed—on the right side, I think. I did not see the pistol.

By the COURT:

When I was first summoned I was on the second floor in the hall in the same building.

By Mr. BRIGHT:

And I heard no pistol shot.

By Mr. FOX:

Mr. Hall's room was on the fourth floor; the hall bed-room back.

By Mr. BRIGHT:

Q. You say that Mr. Munroe came down a moment after; what did he give him?

A. Some brandy, by the doctor's order.

57 Q. And he went back?

A. He did.

Dr. WILLIAM P. JENKINS, being duly sworn and examined as a witness for the plaintiff, testifies as follows:

By Mr. BRIGHT:

I am a physician of eight years' standing. I did not know Mr. Hall in his lifetime. I saw him after he was dead, at 137 and 139 East 21st street, in the forenoon. I do not remember about what hour. He was dead. I examined his wound. I do not remember that I saw any evidence of burning either of the hair or the flesh; I think not. It was a penetrating wound, round and slightly lacerated. There was a round wound on the right side lacerated. I think there was laceration extending slightly upwards. I do not remember exactly, but that is my impression. I did not probe the wound. I made an examination thereof besides a visual examination. I examined the forehead. I examined the forehead and found that the skull was fractured. That examination was made by my hand catching hold and moving the bone. I found crepitus of the bone. My examination consisted of that and nothing else, and my opinion expressed in the statement or affidavit before the coroner was based wholly on what I saw and on the statements that I received on what I heard from others. No coroner was present at that time and I believe not at any time while the body was in Mrs. Munroe's house. I was not there all the time, nor was there any jury there. I did not appear before any jury,

58 and when I speak of aberration and cephalgia I speak wholly and only of what others told me. The same is true respecting the basis and foundation of my statement in the

so-called proofs of death where I say, "Shock from penetrating pistol-shot wound of the head; right temple; mental aberration superinduced by chronic headache." That statement also was based upon the same information and examination that I have already detailed, and no other. I stitched up the laceration of the wound myself, at the undertaker's, and that is why I remember it so distinctly. It was not at the house but subsequently at the undertaker's that I discovered that the frontal bone was broken. On that stitching the hair all around was perfectly open to my observation. I have the pistol here that was present on that occasion. I think it was handed to me at the house, but I am not positive. I have so many suicides that it is almost impossible to remember them all. The pistol is not loaded. There are three empty shells in that pistol, and the remaining two cartridges are in my pocket. It is my impression that those are the two remaining cartridges.

A. The pistol has been examined. I do not think those empty shells in the pistol are in the same condition as when I received them. I don't think they are because the pistol has been snapped several times. There were three empty shells in the pistol when I first received it. I think there were undischarged shells in the pistol when I first received it. I answer on conjecture as to that, but that is my impression. I say I think so because they are the only shells I have of that size, and finding those shells of that size I think they came from that pistol, and also because of the way I
59 kept that pistol from that time, and because they are the same size that fit that pistol. I did not make an examination of the barrel. I noticed that there were three shells discharged, and that is all I noticed. There was no smell of powder in the room when I was there. I do not know whether this pistol was smutty or smoky from any recent firing when I first received it. I do not remember any blood, or brain, or ooze upon that pistol when I received it.

That pistol goes off at half-cock. I did not observe that it did when I first received it. It has not been used while in my possession. I has been in a drawer and was kept at the request of a friend of the deceased. I have kept it carefully. He wanted it distroyed or made way with.

Q. Is it in precisely the same condition now as to hammer that it was when you received it?

A. Yes; nobody has handled it, I believe, except that Mr. Moulton looked at it one day when he came to my office; and I do not know but what this gentleman (Mr. Lawton) looked at the pistol; and I will add one more—Dr. Conway saw it, but I do not think that he has handled it. Dr. Conway saw it since I have had it. I think it was in court yesterday.

Cross-examination by defendant's counsel:

The only person that I remember snapping the pistol is Sherman Moulton and Mr. Lawton. I do not know how many times they snapped it.

Q. You do not know who snapped it when you were away?

A. It was under lock and key, and I am pretty sure that no one did.

60 It is true that I made this certificate at or about the time of the death, by which I certified that the cause of death was suicide by penetrating pistol-shot wound of the head and right temple during temporary or other mental aberration.

By the COURT:

I did — notice indications of any bruise other than the one I described in the temple or any abrasion of the skin anywhere. That was the only wound I saw. It was sufficient to produce death. I have no doubt it was the cause of Mr. Hall's death.

HERMAN R. DICKMAN, being duly sworn and examined as a witness for the plaintiff, testifies as follows:

By Mr. BRIGHT:

My business in October, 1886, was that of an undertaker. I first saw Mr. Hall, the deceased, on the 19th of October, at the time that Dr. Conway went there the second time. Whatever time that was I cannot state. I saw Mr. Hall's wound. There was no burning of the hair or of the face, nor any grains of powder in the flesh. I saw this pistol at that time. I did not examine it, but I had it in my hand. There were three empty shells.

Q. Did the pistol go off at half-cock at that time?

A. I did not examine it. I examined it about two weeks after; about the time when the proofs of death were written up.

JOHN P. WILLIARD, sworn and examined as a witness for the plaintiff, testified as follows:

61 By Mr. BRIGHT:

I met Mr. Hall at Mr. Johnson's apartments on 52nd street. I am told that he died on the evening that I saw him, or that night. I was paying a visit there in the evening and found him doing the same. I did not observe anything so peculiar in Mr. Hall that evening as to notice it. I conversed with him in regard to California. I was told that that was his home. He manifested an interest in California. I had been there myself, and I was interested in it, and had considerable conversation with him during the evening. His manner was perfectly natural. He was perfectly genial and agreeable, and was, as I saw him, an agreeable, pleasant, and genial gentleman; decidedly so, and whatever suffering of headache he was under at the time it is certainly the fact that he exhibited to me the traits I have now described. I did not see him after that night. I left the house with him. I saw him then for the first time. I left the house with him. We rode down in a car together. I think it was a little after 9 o'clock. I presume I may have staid there an hour and a half. During the ride in the cars nothing unusual characterized his manner. We were talking particularly of California. There was a sustained conversation between he and I, he bearing his part

and I mine, the same natural manner all through. I left the car at the corner of 28th St. and 4th avenue.

Mrs. CHARLOTTE E. HALL, sworn and examined as a witness for the plaintiff, testified as follows:

By Mr. BRIGHT:

The Mr. Hall whose death has been described to you was
62 my husband. At the time of his death I was at Newport. At that time I was very ill. I was considered to be fatally ill. I of course knew only by report that my husband had died suddenly. My son at that time was at college in New Haven. He is still there.

Q. I want to know what you know respecting Mr. Hall's habit as to carrying or using a pistol?

A. It was his habit to carry a pistol almost always, and always to have one under his pillow—a loaded pistol—and it was his habit to carry one. I do not know whether or not it was the fact that in the latter part of his life he was subject to dizziness. I know he had a headache at that time. Mr. Hall was a very temperate man.

Q. What was the fact as to Mr. Hall's interest to things around him—as to his hopefulness and to his sanguine nature?

Mr. FOX: Within how short a time before his death had you seen him?

The WITNESS: I had not seen him since July. I was taken away very ill.

Mr. FOX: I object to the question as irrelevant and on the ground that she is not an expert.

(Question allowed; to which ruling defendant's counsel duly excepts.)

A. Very sanguine and very hopeful.

Q. Do you know about his views for the future, and as to his plans for the future—what they were?

(Objected to as irrelevant, conjectural, and misleading.
63 Question allowed; to which ruling defendant's counsel duly excepts. The court instructs the witness that she is not to state hearsay.)

A. I know that he was preparing and arranging rooms for me to be brought back; he was preparing for my return.

Q. What was the fact concerning his interest in his son?

A. How do you mean?

Q. His manifestation of interest and plans for him?

(Objected to as irrelevant. Question allowed; to which ruling defendant's counsel duly excepts.)

A. He was very devoted to his son.

Q. Do you know what degree of interest he felt in his son's prosperity and in his career in college?

(Objected to as irrelevant. Question allowed; to which ruling defendant's counsel duly excepts.)

The COURT: She may state any facts that she knows.

A. I think that all his future hopes were in connection with his son. His manner towards his sister, his friends, and his family was most affectionate. He was attentive to their happiness and safety.

Q. (Handing witness "Defendant's Exhibit A.") Do you recognize this letter as your husband's handwriting?

A. I do. That was his usual handwriting. I think there is not anything agitated or strange about it. I think Mr. Hall has spent over 20 years of his life in San Francisco.

64 HENRIETTA P. SARGEANT, recalled and further examined, testified as follows:

By Mr. BRIGHT:

Q. Did you know your brother's traits of character very well?

A. Yes; his exhibitions of feeling for his family were of the tenderest description. I think he thought of their interest before his own. He was extremely proud and fond of his son. I know of his suffering from headache; he has always seemed subject to headache, as I am. I know what his habit was as to carrying or having under his pillow a pistol or weapon. I know that it was his habit.

Q. You say that he had always suffered from headache. Is it not a fact that his family, as a family, suffered in that manner?

A. They have, always.

Q. At these times, when so suffering from the severe headache, what was his manner in respect to genial conduct or hopeful exhibition of temperament?

(Objected to as irrelevant.)

The COURT: She may state what she observed when he was suffering from severe headache.

By Mr. FOX:

Q. What was the last time you had seen your brother?

A. Six months before his death.

(The last question by Mr. Bright is again objected to as irrelevant and incompetent. Question allowed; to which ruling counsel for defendant duly excepts.)

65 A. He was always cheerful and bore them very bravely.

Dr. JOHN R. CONWAY, JR., recalled by defendant, testified as follows:

By Mr. FOX:

The effect or the natural tendency of melancholia and severe pain in the *hand*, amounting to cephalgia upon Mr. Hall, so far

as producing mental aberration, would depend upon the cause of the pain a great deal. If the pain was due to chronic inflammation of the brain or to the growth of a tumor in the brain a man might suffer such severe pain that the mind would become aberrated for a time.

By Mr. BRIGHT:

Melancholia is a depressed state of the mind. Certain forms of melancholia are insanity. It may become insanity.

Q. When you speak of melancholia do not you speak of something greater, worse, and beyond depression?

A. It may vary from mere depression without insanity.

Q. I speak scientifically. Do you, scientifically, apply melancholia to mere depression?

A. No; not ordinarily.

ANDREW S. BROMWELL, recalled by defendant, testified as follows:

By Mr. FOX: You were this morning asked the question whether you had had any conversation with Charles W. Moulton when he came, as the agent for Mrs. Henrietta P. Sargent, to present her claim for the payment of five thousand dollars by the company, and you said that you did; but, under the ruling of the court, your answer was not then taken. You stated that you could give the
66 substance of that conversation. Will you now please give it?

Mr. BRIGHT: That is objected to.

Mr. FOX: I have proved by the plaintiff that Charles W. Moulton was her agent in the manner of presenting her claim. Now I ask what he said when presenting the claim.

The COURT: As that is objected to, the ruling made this morning is adhered to.

(To which ruling the defendant's counsel duly excepts.)

Q. Did you have any conversation with Mr. John Sherman Moulton?

A. A little; a slight conversation with him upon the subject of the proofs of death that were brought in by him to me.

Q. Do you recall in a general way the substance of that conversation?

A. I do.

Q. State it to the jury.

A. Mr. Moulton came into my private room in the office one day and handed me a paper and said that there were the proofs of death. I looked at them and said that they were incomplete, under the circumstances of the shooting, and that the coroner's verdict did not accompany them, as directed. He said that it would be supplied in a few days. Our conversation was very short. It was generally understood that——

By the COURT:

Q. Did you hear Mr. Moulton's testimony?

A. I did.

By Mr. Fox:

Q. What was the substance of the understanding between
67 you as to the manner in which Mr. Hall met his death, if that was mentioned between you?

(Objected to as irrelevant and incompetent.)

The Court: He may state anything that took place at that conversation.

A. That he had met his death by his inflicting a pistol shot, and that we must have the coroner's verdict, which he said would be furnished in a few days; and it came in a few days later.

The Court: Unless this was said in the conversation which took place between the witness and John Sherman Moulton, it may be stricken out.

The Witness: This was the gentleman; the young man who was on the stand this afternoon (indicating Mr. John Sherman Moulton). Mr. Moulton has never witdrawn or contradicted that statement to me; he has never withdrawn that statement.

By Mr. Bright:

Q. Did you state to Mr. Moulton in substance or in words that the proofs as presented were satisfactory; and then did you ask him if there was a verdict of the coroner; and did he state in answer that de would ascertain?

A. I stated that as far as they went they were satisfactory, but that we must have the coroner's verdict.

Q. Did you say to Mr. Moulton that you had known Mr. Hall well in California, and that if it depended upon you the loss should be paid without any delay? Did you state that in that conversation or in any subsequent conversation?

68 (Objected to as irrelevant; question allowed; exception by defendant.)

A. I think that I expressed such a personal feeling in the matter.

By Mr. Fox:

Q. You say that you expressed such a personal feeling for Mr. Hall. What was your feeling as to your obligations to the defendant, in view of the risk excluded from the policy and the fact of the wound being self-inflicted?

A. In view of the policy of the company, as shown in the certificate that has been presented here, the company could not pay it; it was against the policy of the company to assume the risk of a man's death by shooting or by self-inflicted wounds.

Q. When you say that it was against the policy of the company, what do you mean by that?

A. Against the decision of the managers of the company as to the best interests of the company taken as whole. I did not mean the mere terms of the policy, but the settled course of business of the company.

At this stage of the proceedings the court was adjourned to February 8th, 1888, at 11 o'clock a. m.; at which time the case was resumed as follows:

Dr. THOMAS S. ROBERTSON, being duly sworn and examined as a witness for the defendant, testifies as follows:

By Mr. FOX:

I have been a physician and surgeon in the city of New York for nine years. I knew Edward F. Hall, who died at No. 187 East 21st street, for about a year before his death, and had, during that
69 time, been his physician and prescribed for him, and continued to up to a day or so prior to his death. Mr. Hall had consulted me a number of times for rheumatism and also for severe headache, for which I prescribed from time to time. That was all.

Q. I notice you state in your certificate that he was suffering from melancholia. Describe what you mean from that term.

A. Melancholia is simply a depressed condition of the mind; due sometimes to long-continued illness. I have known of cases where it resulted in temporary mental aberration. I last saw Mr. Hall alive on Sunday, October 17th, 1886. He was then depressed and complaining of his head.

Cross-examination by Mr. BRIGHT:

Melancholia indicates depression. That is what I mean by melancholia in this particular instance. Mr. Hall was in a depressed condition on that day, and was melancholy. I signed that paper at the coroner's office. Coroner Jenkins was there alone.

Mr. Fox moves the court to direct a verdict for the defendant upon the ground that the evidence shows that Edward F. Hall died by his own hand.

The court refuses so to do; to which refusal the counsel for the defendant duly excepts.

Counsel for the respective parties having summoned up the case on behalf of the defendant and the plaintiff, the judge charged the jury, *inter alia*, as follows:

Charge.

GENTLEMEN OF THE JURY: * * *

70 The policy of insurance issued in this case made a contract between Hall and the defendant—a contract subject to the rules of law applicable to all contracts.

Upon the part of the defendant it was stipulated and agreed with Hall and with this plaintiff that if they paid the premiums and duly fulfilled and performed all of the conditions of the contract upon the death of Hall the defendant would pay to this plaintiff five thousand dollars.

It is asserted here by the defendant that that contract has not been performed. One condition of it, and one condition alone, is in con-

troversy. It is provided that if the assured meets his death by a wound inflicted by his own hand intentionally, whether sane or insane—in other words, if he commits suicide, whether he is sane or insane—the policy is forfeited.

This is a provision which these parties, understanding it, had a perfect right to insert in the agreement. The defendant is at liberty to say that it will not assume the risk of death by suicide. It had the same right to insert this stipulation as to say that it would not pay the loss if the assured contracted yellow fever or cholera in some country and at some time of the year when those epidemics prevail. In other words, it is a part of the written contract between these parties, and if it had been violated—if the plaintiff or Hall has violated the contract—it is, of course, entirely clear that the plaintiff cannot recover. * * *

71 The only question upon this proof is, Did Edward F. Hall commit suicide? If he did the policy is void. If he died in some other way—by accident or assassination—it would be otherwise. Upon that issue the burden is upon the defendant to satisfy you by a fair preponderance of proof of the truth of this defence. * * *

When the policy of insurance was introduced with evidence or admissions that the premiums had been paid and proof was given of the death of the assured the plaintiff, if no further evidence had been produced, would have been entitled to a verdict; but the defendant comes into court and asserts that the contract under which the action is brought has not been fulfilled, but has been violated by the assured.

Being an affirmative defence, the onus is upon the defendant to satisfy you by evidence which, in your judgment, outweighs the evidence of the plaintiff that that defence has been established.

I think, gentlemen, that you will be able, perhaps, to arrive at a clearer understanding of this cause when you realize that there is no dispute upon the material facts here. I do not recall—perhaps you may do so—any fact sworn to by any witness which is contradicted by any other witness which bears upon the merits of this controversy. The dispute arises as to presumptions which are drawn from undisputed facts.

Those facts, briefly stated, are these: It appears to be undisputed that Edward F. Hall had lived along twenty years of his life in San Francisco. He frequently—habitually, perhaps—carried a pistol. He some time during his life kept a pistol under his pillow.

72 He was a man of genial, sanguine temperament, hopeful—making plans as to the future—proud of his only son. But it also appears that for a long series of years he had been suffering from severe headache—to such an extent that it created depression so strong at times that the doctor describes it as melancholia. It appears, further, that upon the evening prior to his death he was with a party of friends at the residence of Mr. Johnson, and there, in the presence of two or three witnesses, complained of suffering intense pain in his head, frequently placing his hands to his head

and complaining of the severe pain which he suffered. The pecuniary circumstances of Hall have not been disclosed here further than the evidence as to borrowing money of his sister. It is in proof that he had a wife and son, his son in college, and that he took great interest in his future. But it is also proper that I should call your attention to the fact that at the moment of his death his wife was seriously ill—thought to be hopelessly ill—in a distant city.

Upon the morning of the 19th of October, 1886, at 139 East 21st street, in this city, and between 7 and 7.30 o'clock of that morning Edward F. Hall was found in the back-hall bedroom of the fourth story with a severe wound in his right temple. The wound was so severe that it caused a comminuted fracture of the frontal bone, and fractures radiating up and down and backward from the hole in the right temple, sufficient, unquestionably, to produce his death. He was found lying upon his bed with the clothes drawn up under the armpits, his limbs relaxed, no evidence of any struggle having taken place, and near his right hand, within a few inches or very near it, was the pistol, probably, which has been shown in
73 your presence, with three of its chambers discharged. There was also found upon his stand or desk a letter to his physician, in substance stating that he has been suffering terribly with headache, that he has had it for several days, that it is growing worse and has become well-nigh unbearable.

These, very briefly stated, are the salient facts in this case.

In addition to the evidence which has come to you from the lips of witnesses who have been produced and sworn before you and the depositions taken out of court, about which no criticism is made—in addition to this usual and ordinary evidence which generally appears in cases of this kind, the defendant has introduced in evidence proofs of death furnished by the plaintiff to the defendant in order to induce the payment of this money; and it is insisted upon the part of the defendant that the plaintiff, having produced these proofs for the purpose of inducing the defendant to pay this sum, is now estopped from saying that the cause of death there assigned was not truly assigned. You will recollect, without going into the proofs in detail, that they assert generally that Edward F. Hall met his death by suicide while laboring under temporary aberration of the mind. I think I state it substantially as it is stated in the proofs, and the contention of the defendant is that that closes the discussion. I do not think it is necessary to say further upon that point, gentlemen, than that these proofs are properly in the case. They are proper evidence for you to consider. They are by no means conclusive evidence, but they are evidence which should be
74 taken by the jury in connection with the other testimony in the case and given such weight in determining the main question as the jury may see fit to give them.

Upon the evidence three theories are advanced. The defendant asserts that taking all of the facts and circumstances in the case, the position of Hall, the position of the pistol, the letter stating that he was suffering such agony, and the conclusion is irresistible that he met death by his own hand, intending to kill himself, whether

he was at that time possessed of his reason or whether he was laboring under temporary insanity. The plaintiff's position if, first, that the burden being upon the defendant to satisfy you of that fact that she has a right to rely upon the alleged failure to prove it; and, second, it is asserted that the death may have been occasioned simply and solely by accident; and, third, that it may have been the result of an assassination.

It is true that the precise manner of this death can only be ascertained by what is popularly called "circumstantial" evidence; and I have sometimes thought that there is an unnecessary prejudice in some minds against evidence to which that word is applied. Circumstantial evidence, as popularly known, is that class of testimony where no one saw the act in dispute, but where a number of witnesses come upon the stand, each one swearing, perhaps, to an isolated fact, no two swearing to the same facts, but each one contributing some link which, when grouped together, form a chain of evidence which points to one conclusion and to one conclusion alone.

75 Direct evidence, so called, is where a witness states that he saw the act done or heard the word spoken which is the subject of the controversy. Some of the best writers upon the law of evidence have asserted that direct evidence is open to greater criticism than circumstantial evidence, because witnesses are sometimes honestly mistaken and biased by their interests; their minds and memories are often clouded and obscured by a multitude of intervening events; and the history of our courts show that too often, having taken an oath to tell the truth, they commit upon the stand wilful and corrupt perjury. Suffice it to say that the name given to evidence is wholly immaterial. Whether it be circumstantial, presumptive, or direct, it must be such evidence as satisfies a jury of twelve men of the truth of the fact in dispute, and any evidence that does that, no matter what name may be given to it, is sufficient. Upon the main question in this case, gentlemen, I adopt the language of the court of appeals of this State, which is found in the head-note of a case that has been referred to, and it is this:

"A condition in a policy of life insurance declaring it void in case of the death of the insured by his own hand or act, sane or insane, is valid; and if an insured commits suicide, although at the time utterly bereft of reason, it is a death by his own hand or act within the meaning of the condition, and the policy is forfeited."

So, gentlemen, you will bear in mind that the question for you to answer in this case is this: Did Edward F. Hall commit suicide?

76 If he did, it is wholly immaterial whether he was in his right mind or laboring under temporary insanity. If upon that issue you say that he did commit suicide your verdict must be for the defendant.

If you say that there is a failure to prove that, or if you say upon this proof that the death was caused by accident and nothing else, then there must be a verdict for the plaintiff.

If you come to the conclusion that the plaintiff is entitled to a verdict, it will be for five thousand three hundred and fifty dollars.

COUNSEL FOR THE DEFENDANT: I ask your honor to charge that there is no evidence of any mistake upon the part of the plaintiff or her agents or attorneys at the time they presented the proofs of death.

The COURT: I think that is true; yes; at the time.

The court charged the jury as to all other features of the case fully and in such manner that no exception was taken thereto, and the portions of the judge's charge to the jury not above set forth did not in anywise bear on nor relate to any matters contained in defendant's request to charge.

Counsel for the defendant except to the above charge of the court in the following particulars:

First. To the instruction that, on the question whether the deceased committed suicide or not, the burden of proof is on the defendant to satisfy the jury by evidence which in their judgment outweighs that of the plaintiff that the death was by suicide.

Second. To the charge that the proofs of death are proper evidence in the case, but by no means conclusive.

77 Third. To the submission to the jury of the question whether the deceased died as the result of assassination, and to the charge that the evidence must be such as satisfies the jury of the truth of the fact in dispute.

Before counsel had addressed the jury in summing up defendant's counsel handed to the court a number of written requests to charge, which it was not deemed necessary to read to the jury. These requests and the action of the court thereon are as follows:

First. That although the burden of proof is upon the defendant to show that Edward F. Hall died by his own hand, yet the defendant is not bound to prove that fact beyond a reasonable doubt, but only by a fair preponderance.

The court refuses so to charge except as already charged, and to this refusal to charge as requested counsel for defendant duly excepts.

Second. That the proofs of death were intended for the action of the company, and upon their truth the company had a right to rely, and "unless corrected for mistake" the plaintiff is "bound by them."

The court refuses so to charge except as already charged, and to this refusal to charge as requested counsel for defendant duly excepts.

Third. That in this case there is no evidence of any mistake in the proofs of death, and the statements therein are conclusive upon the plaintiff.

The court refuses so to charge except as already charged, and to this refusal to charge as requested counsel for defendant duly excepts.

78 Fourth. That, the plaintiff having in her proofs of death stated to the company that the death was by suicide, it is incumbent upon her to prove by a preponderance of evidence that the statement was mistaken and that the death was the result of accident.

The court refuses so to charge except as already charged, and to this refusal to charge as requested counsel for defendant duly excepts.

Fifth. That if the death of Edward F. Hall ensued from any physical movement from the hand or body of the assured, even though proceeding from a partial or total eclipse of the mind, the defendant is entitled to a verdict.

The court refuses so to charge except as already charged, and to this refusal to charge as requested counsel for defendant duly excepts.

Sixth. That if the jury finds the fact that Edward F. Hall shot himself in any manner except as by mere accident, then the defendant is entitled to a verdict, no matter whether Hall is sane or insane or whether his act was voluntary or involuntary or whether he knew what he was doing or not.

The court refuses so to charge except as already charged, and to this refusal to charge the defendant's counsel duly excepts.

Seventh. That it is not necessary for the defendant to show that Edward F. Hall was capable of understanding the nature and consequence of his own act, and if they find as a fact that he shot himself while suffering from pain or driven by an uncontrollable impulse to do so, still the defendants are entitled to a verdict.

79 The court refuses so to charge except as already charged, and to this refusal to charge the defendant's counsel duly excepts.

Eight-. That the plaintiff's proofs of death having been presented in her name and by her agent in the matter, and constituting the essential preliminary to her action, they must stand as her acts, and the representations made therein must be taken as true until at least some mistake is shown to have occur-ed in them.

The court refuses so to charge except as already charged, and to this refusal to charge the defendant's counsel duly excepts.

Ninth. That if the jury find that the narration of the manner of the death of the deceased was so interwoven with the statement of his death that the two things were inseparable, and that the statements in the proofs of death show that the plaintiff by such proofs of death claim- that the deceased died by his own hand during a moment of mental aberration, then the defendant is entitled to a verdict.

The court refuses so to charge except as already charged, and to this refusal to charge the defendant's counsel duly excepts.

Tenth. That the plaintiff has failed to give any evidence that the death was accidental.

The court refuses so to charge except as already charged, and to this refusal to charge as requested the defendant's counsel duly excepts.

Eleventh. That the deceased is shown by the complaint and proofs of loss over and above the oral testimony as to the circumstances of his death to have died in fact by his own hand and act, and that whether he was sane or insane at the

80

time or suffering only from mental aberration the defendant is entitled to a verdict.

The court refuses so to charge except as already charged, and to this refusal to charge as requested the defendant's counsel duly excepts.

Twelfth. That the defendant is not bound to exclude every possible theory of accident.

The court refuses so to charge except as already charged, and to this refusal to charge as requested the defendant's counsel duly excepts.

Thirteenth. That the presumption is against the theory of murder.

The court refuses so to charge except as already charged, and to this refusal to charge as requested the defendant's counsel duly excepts.

The jury find a verdict for the plaintiff for five thousand three hundred and fifty dollars ($5,350).

Stay of proceedings for forty days from Feb-uary 8th, 1888, is granted to defendant within which to propose and serve a case, with leave to turn the same to bill of exceptions.

81 U. S. Circuit Court, S. D. N. Y.

Pl'ff's Ex. 1. Feb'y 6, 1888. Geo. C. Appel, Stenographer.

Home Benefit Association of New York, N. Y.

[Vignette.]

Life department.

Certificate No. 5822. Amount, $5,000.

In consideration of the representations and agreements made in the application herefor, and which is a part of this contract, and of each of the statements made therein, which, whether written by his own hand or not, every person accepting or acquiring any interest in this contract, hereby adopts as his own, admits to be material, and warrants to be full and true, and to be the only statements upon which this contract is made; Edward F. Hall, Jr., of San Francisco, State of Cal., is an accepted member of the life department of the Home Benefit Association, subject to all the requirements as hereinafter stated, and for the benefit of Mrs. Henrietta P. Sargent, (sister) or if the said member should survive the beneficiary last named herein, then for the benefit of said member's legal heirs.

Within ninety days from the receipt of satisfactory evidence to the association of death of the said member, during the continuance of this certificate in force, there shall be payable to the said beneficiary or beneficiaries, the sum of five thousand dollars, from the benefit fund of the life department of said association at the time of said death, or from any moneys that shall be realized to the said fund from the next assessment to be made as hereinafter set forth, and no claim shall be otherwise due or payable.

The said member is required to pay the sum of fifteen dollars, as

an expense fee, and a like sum annually, on or before the day of the *the* month in which this certificate is dated; also the amount of one mortuary assessment within sixty days from the date of this certificate, and thereafter within thirty days from the first week day of the months of February, April, June, August, October, and December of each and every year during the continuance of this certificate (or from such other periods as the board of directors may from time to time determine), the amount of one mortuary assessment according to the rates stated hereon; and this certificate shall not be binding upon the association unless the said sum or sums shall have been actually paid to the association, and during the lifetime of said member.

This certificate is subject also to the following conditions:

1. If this certificate, or any continuance thereof, has been or shall be obtained through misrepresentation, fraud or concealment, or if any attempts shall be made, by false swearing or suppression of any material fact on the part of the beneficiary, to obtain any sum under this certificate, then the same shall be absolutely void.

2. Death of the member by his own hand or act, whether voluntary, or involuntary, sane or insane at the time, is a risk not assumed by the association under this contract, and this certificate shall be void if the said member shall die in, or in consequence of, a duel, or by the hands of justice, or in violation of, or attempt to violate, any criminal law of the United States, or of any State or country in which the member may be; or when death may have happened in consequence of war or invasion, or any other voluntary exposure to unnecessary danger, hazard, or perlious adventure, or while the member was employed in mining, blasting, or wrecking, railroad or steamboat service, as engineer, fireman, or brakeman; or in the manufacture and transportation of gunpowder or other explosive substances. And the benefit shall not be held to extend to mysterious disappearances.

3. Whenever the said benefit fund is insufficient to meet an existing claim by death, an assessment shall then be made upon every member of the said life department at the time of the death. Assessments shall be graded as follows, for each $1,000 benefit, according to the age of the member when levied; provided, however, no assessment shall be made when the amount of money in the benefit fund exceeds the amount of one assessment on all the members.

Under 20 years of age----	$0 70	40 to 45 years of age----	$1 30
20 to 25 " " ----	80	45 to 50 " " ----	1 70
25 to 30 " " ----	90	50 to 53 " " ----	2 10
30 to 35 " " ----	1 00	53 to 56 " " ----	2 50
35 to 40 " " ----	1 15	56 to 58 " " ----	3 80

58 to 60 years of age----	$3 30
60 to 62 " " ----	3 80
62 to 64 " " ----	4 40
Over 64 " " ----	5 00

4. A printed or written notice directed to the post office address

of the member as it appears on the books of the association, and deposited in the post office, postage prepaid, shall be sufficient notice of any assessment levied, and failure to renew this membership by payment of such assessment within thirty days from date of levy shall forfeit all claim upon the association from the date of the levy of such assessment.

5. No payment of annual fee or assessment shall be binding upon the association unless paid at the home office, or to an agent holding written authority to receive the same, over the signature of the president and secretary. No agent has power, in behalf of the association, to make or modify any of the terms of this certificate, to extend the time for paying the dues or assessments, or to bind the association by any promise, or by receiving any information or representation.

6. Membership will be forfeited should the member become habitually intemperate, or engage in a more hazardous occupation than that named in the application, without its written consent, or otherwise fail to comply with the requirements herein stated.

7. The said member may travel anywhere in the settled portions of the United States and its Territories (except in localities where yellow fever is prevailing at the time as an epidemic), and in the British provinces; make the passage along the coasts thereof; and may go to, return from and travel in Europe, the Sandwich islands, and the West Indies between the months of November and May inclusive.

8. Proofs of death must be furnished to the association within one year after death, and must contain full answers under oath to the questions in the association blank furnished for that purpose. The omission of any of the answers or statements required must be satisfactorily explained, and supplied by other proofs.

9. This association will not take notice of any assignment of this certificate until a duplicate or certified copy thereof shall be delivered to the association at its home office, and under no circumstances will the association assume any responsibility for the validity of such assignment. An insurable interest must be shown by all claimants at the time of claim hereunder, and any claim by creditor as beneficiary or assignee shall not exceed the amount of the actual *bona fide* indebtedness of the member to him, together with any payments made to the association under this certificate by such creditor, with interest at six per cent.

10. The entire contract contained in this certificate and said application, taken together, shall be construed only according to the terms thereof and the laws of the State of New York, the place of this contract being expressly agreed to be the home office of the said association in the city of New York; and elsewhere than the said State no suit or proceedings at law, or in equity, shall be brought or prosecuted, except in the circuit or district court of the United States; and the said association shall not be liable, nor shall any suit or proceedings be brought, after the lapse of one year from the date of the death of said member.

Seal Home Benefit Association New York N. Y. 1881

In witness whereof, the Home Benefit Association has caused this certificate of membership to be signed by its president and secretary, and its seal to be affixed hereto, at its office in the city of New York, this fifth day of September 1887.

J. C. BARNES *President.*
A. S. BROWNELL *Secretary.*

Compared B.

82 [Endorsed:] Certificate of membership. Without reserve. No. 5822 $5,000 Life department Home Benefit Association New York, N. Y. Edward F. Hall Jr San Francisco Cal. In case of death, notice should be given immediately to the secretary of the Home Benefit Association, 137 Broadway, New York, N. Y. Form Jan. '85.

$— —— — 188–

Received from the Home Benefit Association, — dollars, in full settlement for all claims under the within certificate of membership.

—— ——
—— ——

Witness,
—— ——

The beneficiar- under the within certificate of membership, pursuant to the rules of this association — hereby changed from — the person- named in the within certificate, to — or — legal representatives, said change being made at the written request of — dated, —— — 188–

New York, —— — 188–

—— —— *Secretary.*

83 Dr. T. S. Robertson, 28 East 20th St.

MY DEAR DOCTOR: Will you come down to me at 137 East 21st St. either after your office hours this p. m. or this evening. I am suffering frightfully in my head—the top and back; have had it some days, but it has now grown in intensity so that it is almost unbearable. I used to cure it with chloroform, externally, but can't get it here without a permit. If too busy please send me what you think best.

Yours very truly, EDWARD F. HALL, JR.

San Francisco, Oct'r 19, 1886.

JNO. R. NUGENT, *Coroner,*
For FERDINAND LEVY.

[Endorsed:] U. S. circuit court, S. D. N. Y. Def't's Ex. A. Feb. 6, 1888. George C. Appel, stenographer. For identification. Indence Feb. 7, 1888.

84 United States Circuit Court.

HENRIETTA P. SARGENT
against
THE HOME BENEFIT ASSOCIATION OF NEW YORK.

Please take notice that the defendant is required to produce on the trial of this action the proofs of death of Edward F. Hall, Jr., furnished by the plaintiff to the defendant December 4th, 1886, and in default of its so doing oral or secondary evidence will be offered on the part of the plaintiff on said trial to prove the contents of the same.

Dated New York, January 10, 1888.

Yours, &c., MOULTON, JOHNSON & LEVY,
Att'ys for Plaintiff.

To Francis Lawton, Jr., attorney for defendant.

[Endorsed:] U. S. circuit court, S. D. N. Y. Def't's Ex. B. Feb. 6, 1888. Geo. C. Appel, stenographer.

85 F. L. No. 195. 4th Quar. 1886.

An inquisition on the view of the body of Edward F. Hall, Jr., whereby it is found that he came to his death by shock from pistol-shot wound of the head, self-inflicted during mental aberration.

Inquest taken on the 11th day of December, 1886, before Ferdinand Levy, coroner, per Jno. R. Nugent.

[Endorsed:] U. S. circuit court, S. D. N. Y. Def't's Ex. C. Feb. 6, 1888. Geo. C. Appel, stenographer. For identification. In evidence Feb. 7, 1888.

86 (*Card Annexed to Coroner's Proofs of Death.*)

C. W. Moulton. J. Wm. Johnson. Lipman Levy.

Moulton, Johnson & Levy, lawyers, N. W. cor. Fifth & Vine Sts., Cincinnati. Rooms 85, 86, & 87 Tribune building, New York.

87 Coroner's office, 13 & 15 Chatham street (adjoining East River bridge).

NEW YORK, *December* 11, 1886.

STATE OF NEW YORK, }
City and County of New York, } *ss.:*

Robert Black, clerk in coroner's office of said city, being duly sworn, says that an inquest was held at the house No. 67 Park row (coroner's office) on the body of Edward F. Hall, Jr., born Mass., aged 49, found at 137 E. 21st street.

From the records of this office it appears that said inquest was held by Coroner John R. Nugent on the 11th day of December, 1886,

and deponent further says that the papers hereto attached is a true copy of the inquest; and further deponent says not.

ROBERT BLACK.

Sworn to before me December 11, 1886.

JOHN T. TOAL,
Notary Public, County of New York.

88 STATE OF NEW YORK, } 88:
City and County of New York, }

An inquisition, taken at the coroner's office, No. 67 Park Row street, in the 4 ward of the city of New York, in the county of New York, this 11th day of December, in the year of our Lord one thousand eight hundred and 86, before John R. Nugent, for Ferdinand Levy, coroner, of the city and county aforesaid, on view of the body of Edward F. Hall, Jr., now lying dead at ——:

Upon the oaths and affirmations of six good and lawful men of the State of New York, duly chosen and sworn or affirmed and charged to inquire on behalf of said people how and in what manner the said Edward F. Hall came to his death, do, upon their oaths and affirmations, say that the said Edward F. Hall came to his death by shock from penetrating pistol-shot wound of head, self-inflicted during mental aberration (melancholia) and chronic cephalgia at 137 E. 21st street on October 19, 1886, about 7 a. m.

In witness whereof we, the said jurors, as well as the coroner, have to this inquisition set our hands and seal on the day and place aforesaid.

Jurors:

FREDERICK P. DOERR,	615 East 11th St.
ROBERT KENNEDY,	418 East 14th St.
THOMAS H. CARDEN,	Duane and Park row.
E. JEFFERY,	9 Essex St.
ROBERT BLACK,	40½ St. Mark's place.
HENRY WALTHERS,	179 Madison St.

JNO. R. NUGENT,
For CORONER FERDINAND LEVY. [L. S.]

89 *Testimony.*

CORONER'S OFFICE.

HENRY PIERCE HALL, being sworn, says: I reside at 425 Temple St., New Haven. The deceased, Edward F. Hall, Jr., is my father. On October 19th inst. I received a telegram from Mr. C. W. Moulton notifying me of my father's sudden death, at 139 E. 21st St. I took the first train, and arrived in New York at 3.30 p. m. of same date, and found the body of my father at 359 Fourth Ave. I learned then, for the first time, that the cause of his death was a pistol-shot wound of right temple. I last saw him alive on Sunday, October 17th inst.; he then complained of pain in top of his head; he placed his hand

on the top of his head and said it ached. He at times seemed to me to be very much depressed and abstracted. I believe that my father's act was the result of mental aberration following his head trouble.

HENRY P. HALL.

Taken before me this 19th day of October, 1886.
JNO. R. NUGENT, *Coroner*,
For FERDINAND LEVY.

90 *Testimony.*

CORONER'S OFFICE.

PHILENA E. MUNROE, being sworn, says: I reside at 137 and 139 East 21st street, where I have kept a private boarding-house since Sept. 15, 1886. The deceased, Mr. Edward F. Hall, Jr., boarded with me since I have kept said houses. He was a quiet, distant man, with whom I had very little conversation; but he appeared to be despondent and melancholy at times, which was spoken of by other boarders. On the morning of October 19, 1886, about 7 a. m., I was notified by one of my servants that there was something the matter in Mr. Hall's room. One of my boarders went into the room and found Mr. Hall lying in the bed breathing heavily, and advised me to send for a physician. Dr. Conway, of 14 Lexington Ave., was summoned, and responded shortly after, but was unable to do anything for him. It was not discovered until the arrival of Dr. Conway that he was suffering from a pistol-shot wound of head, nor was the pistol shot heard by any one in the house. He died 7.40 a. m., October 19th, 1886.

PHILENA E. MUNROE.

Taken before me this 19th day of October, 1886.
JOHN R. NUGENT,
For FERDI-AND LEVY, *Coroner.*

91 *Testimony.*

CORONER'S OFFICE.

CHARLES W. MOULTON, being sworn, says: I am an attorney-at-law, and reside at "Hotel Arno," corner of 28th St. and B'way. I have known the deceased, Edward F. Hall, Jr., about a year, and have been his legal adviser about 8 or 9 months. He has complained of trouble with his head for some time, and was under treatment for said condition. I have though- myself, from observation, that his mind was at times affected on account of this pain of his head. I was informed this morning at 9 a. m. that Mr. Hall was dead, at 139 E. 21st St., the result of a pistol wound of the head. I went to said number and identified remains.

CHARLES W. MOULTON.

Taken before me this 19th day of October, 1886.
JNO. R. NUGENT.
FERDINAND LEVY, *Coroner.*

92 *Testimony.*

CORONER'S OFFICE.

JOHN R. CONWAY, Jr., M. D., being sworn, says: I reside at 14 Lexington Ave. I am a physician surgeon. On the morning of October 19, 1886, at 7.30 a. m., I was summoned to 137 E. 21st St., where I found Edward F. Hall, Jr., a boarder in said house, suffering from a pistol-shot wound of head, apparently self-inflicted. I rendered what assistance I could, notwithstanding which he expired at 7.40 a. m. I know nothing of his previous medical history.

JOHN R. CONWAY, M. D.

Taken before me this 20 day of October, 1886.

JNO. R. NUGENT.
FERDINAND LEVY, *Coroner.*

93 *Testimony.*

CORONER'S OFFICE.

THOMAS S. ROBERTSON, M. D., being sworn, says: I am a physician, and reside at 28 W. 20th St. I have known the deceased, Edward F. Hall, Jr., about nine months, during which I have been his medical adviser, and attended him for melancholia and severe headache. I last saw him alive on Sunday, October 17, 1886; he was then despondent and complaining of his head. I learned of his death on morning of 19th day of October, and went to 137–139 E. 21st St., where I identified remains, and also a letter in his handwriting addressed to me, asking me to call and see him at 137 E. 21st St., after my office hours; said letter was dated San Francisco, October 19th, 1886, and was shown me by Dr. Wm. T. Jenkins, coroner's physician, who stated that it was found on a table near deceased's bed.

T. S. ROBERTSON, M. D.

Taken before me this 20 day of October, 1886.

JNO. R. NUGENT.
FERDINAND LEVY, *Coroner.*

94 *Testimony.*

CORONER'S OFFICE.

Dr. T. S. Robertson, 28 East 20th St.

MY DEAR DOCTOR: Will you come down to me at 137 East 21st St., either after your office hours this p. m. or this evening. I am suffering frightfully in my head, the top and back; have had it some days, but it has now grown in intensity so that it is almost unbearable. I used to cure it with chloroform externally, but can't get it here without a permit. If too busy, please send me what you think best.

Yours very truly, EDWARD F. HALL, JR.

San Francisco, Oct'r 19, 1886.

Taken before me this — day of —— 188–.

JNO. R. NUGENT, *Coroner,*
For FERDINAND LEVY.

95 WM. T. JENKINS, M. D., being duly sworn, says: I have made an examination of the body of Edward F. Hall, Jr., now lying dead at 359 Fourth avenue, and from such examination and history of the case, as per testimony, I am of opinion the cause of death is shock from penetrating pistol-shot wound of head self-inflicted during mental aberration (melancholia) and chronic cephalgia.

WM. F. JENKINS, M. D.,
71 *Lex. Ave.*

Sworn to before me this 19 day of October, 1886.
JNO. R. NUGENT,
For FERDINAND LEVY, *Coroner.*

96 U. S. Circuit Court, S. D. N. Y.

DEF'T'S EX. D. Feb'y 6, 1888. Geo. C. Appel, Stenographer.

For identification. In evidence Feb'y 7, 1888.

Home Benefit Association of New York.

Claimant's Oath.

Name of deceased in full and residence? Edward Fitch Hall, Jr. New York city, 139 E. 21st Str.

Date of death? Died October 19, 1886.

Number, date and amount of certificate in the Home Benefit Association? No. 5822; date, September 5, '85; $50,000.

Claimant's name and residence? Henrietta P. Sargent (sister of deceased), West Medford, Mass.

In what capacity, or by what title, do you make the claim? Assignee & payee under the certificate.

Are you legally entitled to receive the entire amount payable on the certificate? I am legally entitled to receive the entire sum.

If not related, have you any interest in the life of the assured? I am his sister.

How was that interest acquired? For money loaned to him for which this certificate was assigned.

If a creditor, state the actual amount of indebtedness due you from the deceased, how and when did it accrue? $5,000 & interest at 5% since June 22, 1886, on his note dated June 22, 1885. He also owed me $600 & interest at 6% from Mar. 26, 1886. The certf. was understood to be as collateral for the larger note only, which was given for the above loan.

Name, age and address of each of the claimants, and relationship to deceased, if any? No other claimants are known to me. Name in full: —. Age: —. Relationship: —. Full address of each: —.

How long have you known deceased? Forty years and upward—all his life.

Where had deceased lived and visited for his health since above certificate was issued? Lived in San Francisco & New York.

Where had he lived and visited for his health within two years prior to date of certificate? I do not know of his having visited any place for his health.

The several occupations of deceased since the above certificate was issued? Commission merchant & broker.

Place and date of birth of deceased? Place of birth: Boston, Mass. Date of birth:—Year: 1838. Month: Nov. Day: 15th.

From what source of knowledge or information do you fix the place and date of birth? Family record.

When did health of deceased first begin to be affected? I consider that his health began to fail from the time of a serious attack of illness & unconsciousness which he experienced at West Point in July, 1886.

Remote cause of death? Sudden death.

Duration of illness? —.

Immediate cause of death? —.

Give every particular relating to the cause and circumstances of the sickness and death of deceased? Undersigned was in West Medford at time of death of deceased & can give hearsay only.

What ailments, diseases, illness, weakness, infirmities, disabilities or injuries has deceased had since the date of the above certificate? State facts fully. None known to undersigned, except serious pain in head, severe enough to produce dizziness and unconsciousness at times, which came on a few weeks prior to his death.

What ailments, diseases, illness, weakness, infirmities, disabilities or injuries did deceased have within two years prior to date of certificate? —.

Name and address of attending physicians during last illness? Dr. T. J. Robertson, No. 28 E. 20th Str., New York.

Name and address of every physician who attended or was consulted, or who prescribed for deceased since the date of the above certificate, and for two years prior thereto? Dr. John Conway, Jr., & Dr. Jenkins were called in, as I am informed, & prescribed for him.

State distinctly the habits of the deceased with reference to the use of spirituous or fermented liquors, opium or other narcotics. Was not in the habit of taking either to excess at or near the time of his death.

Was the death of deceased caused by his own hand or acts, or in consequence of a duel, or in violation of any law? See statement of coroner's physician, Dr. Jenkins.

In what other companies or societies, and to what amount in each, was life of deceased insured? See annexed schedule herewith.

In case of coroner's inquest, furnish the association with the verdict of the jury, and all the evidence on which such verdict was based. —.

Did deceased make any assignment or will, disposing of or changing, in any manner, the payment of this insurance? He was not done so, so far as I know or am informed.

Give names and addresses of five persons (not relatives) who were acquainted with deceased.

Name.	Residence.
C. W. Moulton, office,	154 Nassau Str., N Y.
B. P. Ryan,	do. do.
W. A. Carr,	do. do.
M. Ballard, Hotel Normandee,	do.
R. C. Johnson, Palermo apartment-house, N. Y.	

Give name and address of clergyman who officiated at funeral of deceased. Rev. Horatio Gray, Boston, Mass., # 3 Ashburton place.

Claimant's signature: HENRIETTA P. SARGENT.

Oath.

STATE OF MASSACHUSETTS, *County of Suffolk,* } ss:

I, Henrietta P. Sargent, the claimant above named, having been duly sworn, do, on my oath, depose and say, that I am the person who made and subscribed the foregoing answers, and that I have carefully read the above questions and answers thereto, and understand the same; that each and every of said answers are full, complete and true, and are made for presentation to the Home Benefit Association to make claim for the moneys that may be payable under the above certificate.

HENRIETTA P. SARGENT,
Claimant's Signature.

Subscribed and sworn to before me, a justice of peace in and for the county and State above named on this, the 24th day November, A. D. 1886.

ALFRED C. VINTON,
Justice of Peace within & for the Commonwealth of Massachusetts.

97 *Coroner's Attending Physician's Oath.*

(All answers must be in the physician's own handwriting.)

Your name, residence and post-office address? Wm. T. Jenkins, 100 Lexington Ave.

How long have you practiced as a physician, and from what college did you graduate, and when? More than 6 years; University of Va.; '79.

Name of deceased in full? Edward F. Hall, Jr.

Place and date of death? 137 E. 21st Str., October 19, 1886.

How long had you known deceased? / How long have you been the medical adviser of deceased? / Were you the attending physician during the last illness of deceased? } As coroner's physician on date & at place above specified I made an examination of body Edward F. Hall, Jr., & from said examination & evidence——

What was age of deceased? 48 years.

From what source of knowledge, or information, do you fix the age? Statement of son & friends; also appearance?

Was he apparently older than the age above given? No.

What had been the several occupations of deceased? Commission merchant & broker.

The last place of residence of deceased? 137 E. 21st Str.

What places had he visited for his health since the date of certificate, and for two years prior thereto?

When did the health of deceased first begin to be affected?

Duration of different illnesses or ailments?

Duration of last illness?

Date of your first visit, or prescription, in last illness?

Date of last visit?

State the remote cause of death; if from disease, give the predisposing causes, date of the first appearance of its symptoms, its history, and the symptoms present during its progress.

} I do not know.

State the immediate cause of death. Shock from penetrating pistol shot; wound of head (right temple); mental aberration superinduced by chronic headache.

If from any cause other than disease, state the medical and other facts connected therewith. No.

Was a post-mortem examination made; by whom, and with what results? No.

Was the death of deceased caused or induced or hastened by the use of spirituous or fermented liquors, opium or other narcotics? —.

Was the death of deceased caused or accelerated or aggravated by his own hand or acts?

Has deceased ever had any other disease, acute or chronic, or had he ever had any injury or infirmity of which you have any knowledge or information? If so, what and when?

Was there anything in the habits, or mode of life of deceased, predisposing to disease?

Had the deceased, at any time, to your knowledge or information, had, or been affected with any organic or functional disease or weakness? If so, what? State particulars fully.

Give names and post-office address of physicians who have at any time attended or prescribed for deceased.

} I examined the deceased only as coroner's physician, and therefore am unable to make any further statement than above other than from the history. His mental condition was probably due to chronic headaches, which was caused either by chronic meningitis or tumor of brain.

Do you know that the said deceased, and the person claimed to be insured by the certificate of the Home Benefit Association of New

York, mentioned in the foregoing claimant's oath, is one and the same person? Yes.

Did deceased use spirituous liquors or fermented liquors? If so, to what extent and with what effect? I do not know, but physical appearance did not indicate.

Signature of physician: WM. T. JENKINS, M. D.,
Coroner's Physician, 100 *Lexington Ave., New York City.*

Oath.

STATE OF NEW YORK, }
County of New York, } *ss:*

I, Wm. T. Jenkins, the physician above named, having been duly sworn, do, on my oath, depose and say, that I am the person who made and subscribed the foregoing answers, and that I have carefully read the above questions and answers thereto, and understand the same; that each and every of said answers are full, complete and true, and are made for presentatian to the Home Benefit Association and to make claim for the moneys that may be payable under the above certificate.

WM. T. JENKINS, M. D.,
Coroner's Signature.

Subscribed and sworn to before me, at New York city, in and for the county and State above named on this, the second day of December, A. D. 1886.

SHERMAN MOULTEN,
Notary Public, N. Y. Co.

98 *Officiating Clergyman's Oath.*

(If there was no officiating clergyman, some clergyman who was acquainted with deceased.)

Your name, occupation, residence and post-office address? Rev. Horatio Gray, Boston, Mass., = 3 Ashburten place.

Name of deceased in full? Edward Fitch Hall, Jr.

Do you know that the said deceased and the person claimed to be insured by the certificate of the Home Benefit Association of New York, mentioned in the foregoing claimant's and physician's oaths, are one and the same person? I do know it.

How long have you known the deceased? Nearly all his life.

What was the age of deceased? Forty-seven years & eleven months.

What was the occupation and place of residence of deceased and date of death? Commission merchant & broker; New York city; died October 19, 1886.

What was the place and date of birth of deceased? Born at Boston, Mass., Nov. 15, 1838.

Give number, date, and amount of certificate. Cert. No. 5822, Sept. 5, 1885, $5,000.

What diseases has the deceased had since the date of said certificate? None that I am aware of.

What diseases, ailments, injuries or infirmities has the deceased had, or been afflicted with, prior to the date of said certificate, of which you have any knowledge or information? State particulars fully. I have no knowledge of any.

Did the deceased use spirituous or fermented liquors, opium or other narcotics; if so, to what extent? Not that I am aware of.

Has the deceased, at any time, visited or travelled for the benefit of his health; if so, when and where? I do not know of his having done so.

Clergyman's signature: HORATIO GRAY.

Oath.

STATE OF MASSACHUSETTS, }
County of Suffolk, } *ss:*

I, Horatio Gray, the clergyman above named, having been duly sworn, do, on my oath, depose and say, that I am the person who made and subscribed the foregoing answers, and that I have carefully read the above questions and answers thereto, and understand the same; that each and every of said answers are full, complete and true, and are made for presentation to the Home Benefit Association to make claim for the moneys that may be payable under the above certificate.

——— ———,
Clergyman's Signature.

Subscribed and sworn to before me, a justice of peace in and for the county and State above named on this, the 24th day of November, A. D. 1886.

ALFRED C. VINTON,
Justice of Peace within & for the Commonwealth of Massachusetts.

Friend's Oath.

(Who must be a responsible householder.)

Your name, occupation, residence and post-office address? Charles W. Moulton, Tribune b'l'd'g, New York.

Name of deceased in full? —.

Do you know that the said deceased and the person claimed to be insured by the certificate of the Home Benefit Association of New York, mentioned in the foregoing claimant's and physician's and clergyman's oaths, are one and the same person. I do.

How long have you known the deceased? One year.

What was the age of deceased? About forty-eight years.

What was the occupation and place of residence of deceased? Commission merchant & broker.

What was the place and date of birth of deceased? Boston, Mass.

Give number, date and amount of certificate. —.

What diseases has the deceased had since the date of said certificate? None known.

What diseases, ailments, injuries or infirmities has the deceased had, or been afflicted with, prior to date of said certificate, of which you have any knowledge or information? State particulars fully. None known to me.

Did the deceased use spirituous or fermented liquors, opium, or other narcotics; if so, to what extent? He was temperate in all things.

Has the deceased, at any time, visited or travelled for the benefit of his health; if so, when and where? Not known to me.

Have you any interest in the above certificate, or the proceeds thereof? None whatever.

Signature of friend: C. W. MOULTON.

Oath.

STATE OF NEW YORK, }
County of New York, } *ss:*

I, C. W. Moulton, the friend above named, having been duly sworn, do, on my oath, depose and say, that I am the person who made and subscribed the foregoing answers, and that I have carefully read the above questions and answers thereto, and understand the same; that each and every of said answers are full, complete and true, and are made for presentation to the Home Benefit Association to make claim for the moneys that may be payable under the above certificate.

C. W. MOULTON,
Friend's Signature.

Subscribed and sworn to before me, at New York city in and for the county and State above named on this, the 26th day of November, A. D. 1886.

SHERMAN MOULTON,
Notary Public, N. Y. Co.
MOULTON, JOHNSON & RYAN,
Attorneys for Claimant, 154 *Nassau St., N. Y.*

99 *Undertaker's Oath.*

Your name, residence, and post-office address? H. R. Dickman, 359 4th Ave.

Name of deceased in full? Edward F. Hall, Jr.

Residence and occupation of deceased? Broker, 137 E. 21st Str., N. Y.

Date of birth of deceased? Nov. 15, 1838.

Date and place of death of deceased? Oct. 19, 1886; 137 E. 21st.

Did you inter the deceased, when and where? Put body on train for Boston, Mass.

Do you know that the person interred by you and the person

claimed to be insured by the certificate of the Home Benefit Association, of New York, mentioned in the foregoing claimant's, physician's, and friend's oath, are one and the same? Yes.

Signature of undertaker: H. R. DIECKMAN.

Oath.

STATE OF NEW YORK, }
County of New York, } ss:

I, H. R. Dieckman, the undertaker above named, having been duly sworn, do, on my oath, depose and say, that I am the person who made and subscribed the foregoing answers, and that I have carefully read the above questions and answers thereto, and understand the same; that each and every of said answers are full, complete and true, and are made for presentation to the Home Benefit Association to make claim for the moneys that may be payable under the above certificate.

H. R. DIECKMAN,
Undertaker's Signature.

Subscribed and sworn to before me, at New York city in and for the county and State above named on this, the 30th day of November, A. D. 1886.

SHERMAN MOULTON,
Notary Public, N. Y. Co.

[Endorsed:] The blanks on this side are to be filled at the association's office only. Home Benefit Association of New York. Proofs of the death of Edward F. Hall, Jr. Place of death, 137 E. 21st; residence, New York. No. of certificate, 5822, $5,000. Submitted to the association for examination and approval. Date presented, —; by whom presented, —— ——; approved by —— ——.

Instructions.

No. 1. Claimant's oath, is to be made by the person legally entitled to receive the money, who must state by what title he or she makes the claim, whether as the beneficiary named in the policy, or as executor or administrator of a deceased beneficiary, or as guardian or other legal representative of a minor, or as a trustee, or as assignee. In case of assignment, a sworn statement of interest must be made, and a copy of the assignment furnished. Executors, administrators, and guardians must send exemplified copies of their appointment and certificate of their qualification. Trustees, unless named in the certificate, must exhibit their authority.

No. 2. Attending physician's oath, is to be executed by the physician attending the deceased in his or her last illness. If more than one physician was employed, the oath of each must be obtained. The entire oath must be in the handwriting of the physician.

No. 3. Officiating clergyman's oath. If there was no officiating clergyman, some clergyman who was acquainted with deceased.

No. 4. Friend's oath, is to be executed by some responsible house-

holder intimately acquainted with the deceased, cognizant of his or her death, and not interested in the claim.

No. 5. Undertaker's oath, is to be executed by the undertaker or sexton who interred the deceased. If necessary, it may, with slight change, be executed instead by the person who officiated at the interment.

In cases of diseases of the brain, or from insanity, full particulars as to the cause and duration of these diseases, and information as to habits of deceased, will be required.

In cases of suicide, a certified copy of the verdict and of the evidence on which such verdict is based, before coroners, will invariably be required; and in all cases of sudden death, especially from unknown cause, the particulars and result of any investigation held in the case will be required.

Every question must be distinctly and fully answered; and the association reserves the right to ask any further questions necessary under the circumstances of any particular case.

☞ Each certificate must be sworn to before an officer duly authorized to administer oaths; and his authority, and the genuineness of his signature, must be attested by the clerk of a court of record.

If the oath be administered in a foreign country, the official character of the person administering the same, or of the clerk or other officer of a court certifying thereto, must be authenticated by a consul or minister of the United States residing in such foreign country.

The intervention of brokers or commission men is unnecessary in the collection of claims by death from this association. All proofs of death should be forwarded to our duly authorized agents, through whom the claims will be collected without expense, or sent direct to the association's office, where payment will be made on approved claims without charge.

100 U. S. Circuit Court, S. D. N. Y.

DEF'T'S EX. E. Feb'y —, 1888. Geo. C. Appel, Stenographer.

No. 5822.

Application for a Certificate of Membership in the Home Benefit Association.

Office, 137 Broadway, cor. Cedar street, New York.

Do not fill up this space.

Application of Edward F. Hall, Jr.
F. C. Havens, agent.
Approved by —— ——, M. D.
" —— ——
" —— ——
Decline, —.
Received Sept. 5th, 1885.
8—155

Certificate written by F.
No., 5822.
Date, Sept. 5.
Amount, 5,000.
Annual, 15.

1. Name, in full, Edward F. Hall, Jr. Occupation (state the particular branch of business or trade), broker. Residence, San Francisco; county, San Fran.; State, Cal.

2. P. O. address (where notices are to be sent), 330 Pine St., San Francisco.

3. Place and date of birth? Place: Boston. State or country: Mass. Year: 1838. Month: Nov. Day: 15. Age last birthday: 46.

4. Amount applied for, $5,000, without reserve. To whom payable, Henrietta P. Sargent, wife of W. S. Sargent. Relationship, sister. Residence, West Medford, Mass.

5. Have you made any proposal or application for insurance upon your life, upon which the full amount of insurance asked for has not been issued? No. If yes, state full particulars, including the name of each company.

6. Has your life been insured? Yes. If yes, what Co.'s and to what amounts? Mutual Life several times; Equitable, 1880, $20,000; H. B. Ass'n, S. F., 1882, $5,000.

7. Name and address of two friends who have the largest general acquaintance with you:

Name, John Scott Wilson; address, S. F. stock exchange.
Name, Marcus P. Hall; address, "

I do hereby declare that all the particulars and statements made by me in connection with this application are true, to the best of my knowledge and belief, and I do hereby acknowledge, consent, and agree that any untrue or fraudulent statement made by me, or to any medical examiner for said association, or any concealment of facts by me, shall forfeit and cancel all rights to any benefit under the above-named contract, and expressly waive all provisions of law forbidding any physician who has attended me from disclosing all information which he thereby acquired.

Dated at San Francisco, State of Cal., this 27th day of Aug., 1885.

EDWARD F. HALL, JR., *Applicant.*

Witness:
F. C. HAVENS.

Physician's remarks.

69.

Sept., 1886.

(Printed on margin.)

This margin is for binding. Do not write on it nor deface it.

Instructions.—Applicants or agents should see that all questions are fully answered and names plainly written before sending the

application to the home office. This will save trouble and delay of returning for correction. Where the association has no appointed medical examiner the necessary examination may be made by a regular "old-school" physician of good standing, holding a license to practice from the State board of examiners.

Medical Examiner's Report.

The examiner is expected to answer each question distinctly and decidedly, after a strict personal examination of the applicant at the time. He must have the application complete, and is requested to read it attentively, before making his examination, as his opinions have to be depended upon at the home office, in the final determination of the risk, and are valuable only in proportion to their disinterestedness, clearness, accuracy and precision.

Questions to be answered by the applicant to the examining physician.

1. Have your grandparents, parents, brothers, or sisters been afflicted with insanity, apoplexy, paralysis, consumption, cancer, or other hereditary disease? No. If yes, state particulars.
2. Have you been afflicted since childhood with any of the following complaints? Answer yes or no to each. Apoplexy? No. Bilious colic? No. Catarrh? No. Consumption? No. Dropsy? No. Epilepsy? No. Fevers? No. Gout? No. Palpitation of the heart? No. Paralysis? No. Pneumonia? No. Rheumatism? No. Rupture? No. Spitting of blood? No. Subject to a cough? No. Any disease of the urinary organs (kidneys, bladder or stricture)? No. Any disease not enumerated? No. If yes, state particulars in this space.
3. Have you received any wound, hurt or serious bodily injury? No. If yes, state particulars.
4. Has any physician given an unfavorable opinion regarding your application for insurance? No.
5. Do you make habitual use of alcoholic stimulants, opium, or other narcotic? No; drink liquor in moderation.
6. Are you now in good health, and able to attend to occupation daily? Yes. And for how many consecutive years have you been so? Always.
7. When were you last confined to the house, and from what cause? Occasionally from nervous headache.
8. Name and residence of your usual medical attendant? Dr. Eckel.
9. Have you been successfully vaccinated? Yes. When? —.
10. Have any material facts regarding your past health or present condition been omitted? No.

State family history in answer to the following particulars. Where particulars cannot be given, state why.

	Present ages, if living.	Present state of health of each.	Ages at death.	Cause of death. State particulars.
11. Father	86	Died at West Medford Dec., 1884.		
12. Mother	77			
13. How many brothers have you had?	1—41	Good.		
14. How many sisters have you had?	1—48	"		
15. Father's father			43	Unknown.
16. Father's mother			77	
17. Mother's father			58	Lost at sea.
18. Mother's mother			39	Unknown.

Applicant's declaration.—I further declare and agree that my answers to the questions put by the medical examiner are correct and true, and that I am the person who signed the application on the opposite side, and was examined as stated.

EDWARD F. HALL, JR., *Applicant.*

The examining physician will answer in full the following questions:

Name, E. F. Hall, Jr.; examined at San Francisco.

19. Weight? 156 lbs. Height? 5 feet 4² inches. Measurement of waist? 37 inches. Measurement of chest at forced expiration? 34 inches. Measurement of chest at forced inspiration? 37 inches. Respirations per minute? 21. General appearance? Good.

20. Are the lungs in a perfectly healthy condition? Yes. Is the respiration full, gentle and regular? Yes. Is there any indication of disease of the organs of respiration? No. If yes, what?

21. Is the action of the heart uniform, free and steady? Yes. Are its sounds and rhythm normal? Yes. Rate and general character of the pulse? 85.

22. Has the party had any serious disease or injury? No. If yes, state results.

23. Is there a hernia? No. If yes, has it ever strangulated, or is it likely to? Is a truss worn? State other particulars.

24. Examination of the urine: Sp. gr., 1018; reaction, acid. Albumen? No. Sugar? No.

25. Does anything in the party's figure, general appearance, manners or conversation indicate ill health, feeble constitution, irregular or intemperate habits? No. And if yes, what?

26. Do you believe the party will live to the full expectancy of a robust person? Yes.

27. In your judgment is the person examined safely insurable, and do you advise the risk? Yes or no. Yes.

I hereby certify that I have this day made a personal examination in private, of the above-named person, that the foregoing an-

swers are in my own handwriting, and that I witnessed his writing the signature above.

Date, Aug. 27th, '85.

C. W. ELLINWOOD, M. D.

Where and when graduated: ——.

Medical reference (for physicians who have not previously made examinations for the association): ——.

Add special remarks on opposite side if necessary.

(Printed on margin:) This margin is for binding. Do not write on it nor deface it.

101 U. S. Circuit Court, Southern District of New York.

HENRIETTA P. SARGENT *ag'st* HOME BENEFIT ASSOCIATION.

It is hereby stipulated and agreed that the foregoing case, with the exhibits thereto annexed, may stand as the case as settled herein, and that the same may be turned into a bill of exceptions within ten days after the final hearing and decision of the defendant's motion for a new trial herein, without further notice by either party to the other.

Dated N. Y., April 13th, 1888.

MIRON WINSLOW,
Plaintiff's Attorney.
FRANCIS LAWTON,
Def't's Attorney.

Therefore, because none of the said exceptions so offered and made to the rulings and decision of the said court appear upon the record of said trial, on the prayer of the defendant, this bill of exceptions is sealed.

ALFRED C. COXE, [L. S.]
U. S. Judge.

102 (Endorsed:) Circuit court of U. S., so. district of N. Y. Henrietta P. Sargent ag'st Home Benefit Association. Bill of exceptions. Francis Lawton, attorney for defendant, 170 Broadway, N. Y. U. S. circuit court. Filed May 23, 1888. John A. Shields, clerk.

103 Supreme Court of the United States.

HOME BENEFIT ASSOCIATION, Pl'ff in Error, *against* HENRIETTA P. SARGENT, Def't in Error. } Assignment of Errors.

Afterwards, to wit, on the second Monday of October, in the same term, before the justices of the said court, at the capitol, in Washington, came the said plaintiffs in error, by Francis Lawton and

Austin G. Fox, their attorneys, and say that in the record and proceedings aforesaid there is manifest error in this, to wit:

1st. That the court below erroneously received the evidence of the witness, John Sherman Moulton, as to a conversation between himself and some one in the office of the defendant below, other than Mr. Andrew S. Brownell, as to how the inquest of the coroner on the view of the body of Edward F. Hall came to be presented to the defendant below.

See bill of exceptions.

2nd. That the court below erroneously received the evidence of the witness, Mrs. Charlotte R. Hall, as to the views and plans for the future of her husband, Edward F. Hall, in his lifetime; which evidence was to the effect that in the month of July preceding his death her husband was preparing rooms and arranging for her re-
104 turn to him.

B. of E. 36.

3rd. That the court below erroneously received the evidence of the witness, Mrs. Charlotte R. Hall, as to the interest manifested by her husband, Edward F. Hall, in his lifetime, in his son and the degree of interest felt by her said husband in his son's prosperity and career in college and the plans made by her said husband for the future of his son; which evidence was to the effect that all her said husband's future hopes were in connection with his son.

B. of E. 36.

4th. That the court below erroneously received the evidence of the witness, Henrietta P. Sargent, as to the general conduct and hopeful condition of temperament of her brother, Edward F. Hall, in his lifetime, while suffering from severe headache; which evidence was to the effect that he was always cheerful and bore them bravely.

B. of E. 37–38.

5th. That the court below erroneously received the evidence of the witness, Andrew S. Brownell, secretary of the corporation defendant below, upon cross-examination as to a statement by him to the agent of the plaintiff below that he had known the assured, Edward F. Hall, well in California, and that if it depended on the witness the loss should be paid without any delay; which evidence was to the effect that the witness thought he had expressed such a personal feeling.

B. of E. 41.

105 6th. That the court below erroneously refused to receive the evidence of the witness, Andrew S. Brownell, secretary of the defendant below, offered by the defendant below, as to the substance of a conversation had after the death of the insured and between the 15th and 20th of November, 1886, or thereabouts, between said Brownell as such secretary and Charles W. Moulton as agent or attorney for the plaintiff below, with regard to the claim on the policy now in suit.

B. of E. 8.

7th. That the court below erroneously refused to receive the evidence of the witness, Andrew S. Brownell, secretary of the defend-

ant below, offered by the defendant below, as to the conversation referred to in assignment of error No. 6, *supra*, with Charles W. Moulton after the said Moulton had been shown by the evidence of the plaintiff below to have been her agent or attorney.

B. of E. 39.

8th. That the court below erroneously refused to direct a verdict for the defendant below, asked for on the ground that the plaintiff below failed to show that she ever presented to the defendant below satisfactory evidence of the death of Edward F. Hall, the assured by the policy in suit, or that she has ever presented any evidence of his death, the policy of insurance containing specific provisions
106 as to the facts which are required to be proved and the manner in which they are to be proved.

Pl'ff's Ex. No. 1., B. of E. 1-4.

9th. That the court below erroneously refused to direct a verdict for the defendant below, asked for on the ground that the evidence shows that Edward F. Hall, the assured in the policy in suit, died by his own hand.

B. of E. 43.

10th. That the court below erroneously charged the jury as follows: "But the defendant comes into court and asserts that the contract under which the action is brought has not been fulfilled, but has been violated by the assured. Being an affirmative defence, the onus is upon the defendant to satisfy you by evidence which, in your judgment, outweighs the evidence of the plaintiff that the defense has been established."

B. of E. 45.

11th. That the court below erroneously charged the jury as follows: "The defendant has introduced in evidence proofs of death furnished by the plaintiff to the defendant in order to induce the payment of this money, and it is insisted upon the part of the defendant that the plaintiff, having produced these proofs for the purpose of inducing the defendants to pay this sum, is now estopped from saying that the cause of death there assigned was not truly assigned. You will recollect, without going into the proofs in detail, that they assert generally that Edward F. Hall met his death
107 by suicide while laboring under temporary aberration of the mind. I think I state it substantially as it is stated in the proofs, and the contention of the defendant is that that closes the discussion. I do not think it necessary to say further upon that point, gentlemen, than that these proofs are properly in the case. They are proper evidence for you to consider. They are by no means conclusive evidence, but they are evidence which should be taken by the jury in connection with the other testimony in the case and given such weight upon determining the main question as the jury may see fit to give them."

B. of E. 48.

12th. That the court below erroneously charged the jury as follows: "The only question on this proof is did Edward F. Hall commit suicide? If he did the policy is void; if he died in some other way, by accident or assassination, it would be otherwise. Upon that

issue the burden is upon the defendant to satisfy you by a fair preponderance of proof of the truth of this defense."

B. of E. 52.

13th. That the court below erroneously refused to charge the jury, in terms, that although the burden of proof is upon the defendant to show that Edward F. Hall died by his own hand, yet the defendant is not bound to prove that fact beyond a reasonable doubt, but only by a fair preponderance.

B. of E. 52.

108 14th. That the court below erroneously refused to charge the jury in terms that the proofs of death were intended for the action of the company, and upon their truth the company had the right to rely, and unless "corrected by mistake" the plaintiff is bound by them.

B. of E. 52.

15th. That the court below erroneously refused to charge the jury in terms that in this case there is no evidence of any mistake in the proofs of death, and that the statements therein are conclusive upon the plaintiff.

B. of E. 52.

16th. That the court below erroneously refused to charge the jury in terms that, the plaintiff having in her proofs of death stated to the company that the death was by suicide, it is incumbent upon her to prove by a preponderance of evidence that the statement was mistaken and that the death was the result of accident.

B. of E. 53.

17th. That the court below erroneously refused to charge the jury in terms that if the death of Edward F. Hall ensued from any physical movement from the hand or body of the assured, even though proceeding from a partial or total eclipse of the mind, the defendant is entitled to a verdict.

B. of E. 53.

109 18th. That the court below erroneously refused to charge the jury, in terms, that if the jury finds the fact that Edward F. Hall shot himself in any manner except as by mere accident, then the defendant is entitled to a verdict, no matter whether Hall was sane or insane or whether his act was voluntary or involuntary or whether he knew what he was doing or not.

B. of E. 53.

19th. That the court below erroneously refused to charge the jury, in terms, that it is not necessary for the defendant to show that Edward F. Hall was capable of understanding the nature and consequences of his own act, and if they find as a fact that he shot himself while suffering from pain or driven by an uncontrollable impulse to do so, still the defendants are entitled to a verdict.

B. of E. 54.

20th. That the court below erroneously refused to charge the jury, in terms, that the plaintiff's proofs of death having been presented in her name and by her agent in the matter and constituting the essential preliminary to her action they must stand as her acts, and

the representations made therein must be taken as true until at least some mistake is shown to have occurred in them.

21st. That the court below erroneously refused to charge
110 the jury, in terms, that if the jury find that the narration of the manner of the death of the deceased was so interwoven with the statement of his death that the two things were inseparable, and that the statements in the proofs of death show that the plaintiff by such proofs of death claimed that the deceased died by his own hand during a moment of mental aberration, then the defendant is entitled to a verdict.

B. of E. 54.

22nd. That the court below erroneously refused to charge the jury, in terms, that the plaintiff has failed to give any evidence that the death was accidental.

B. of E. 55.

23rd. That the court below erroneously refused to charge the jury, in terms, that the deceased is shown by the complaint and proofs of loss, over and above the oral testimony as to the circumstances of his death, to have died in fact by his own hand and act, and that whether he was sane or insane at the time or suffering only from mental aberration the defendant is entitled to a verdict.

B. of E. 55.

24th. That the court below erroneously refused to charge the jury, in terms, that the defendant is not bound to exclude every possible theory of accident.

B. of E. 55.

111 25th. That the court below erroneously refused to charge the jury, in terms, that the presumption is against the theory of murder.

And, further, that by the records aforesaid it appeared that the judgment aforesaid in form aforesaid given was given for the said defendant in error against the said plaintiff in error, whereas by the law of the land the said judgment ought to have been given for the said plaintiff in error against the said defendants in error.

And the said plaintiff in error prays that the judgment aforesaid for the errors aforesaid and other errors in the record and proceedings aforesaid may be reversed, annulled, and altogether held for nothing, and that the said plaintiffs in error may be restored to all the things which they have lost by occasion of said judgments.

AUSTIN G. FOX,
Att'y for Pl'ff in Error.

(Endorsed:) U. S. Supreme Court. Home Benefit Association, pl'ff in error, ag'st Henrietta P. Sargent, def't in error. Assignment of error. Francis Lawton, attorney for pl'ff in error, 170 Broadway, N. Y. Service of a copy of the within assignment of error is hereby admitted. Dated Sept. 14, 1888. Miron Winslow, att'y for def't in error. U. S. circuit court. Filed Sept. 14, 1888. John A. Shields, clerk.

112 Supreme Court of the United States.

HOME BENEFIT ASSOCIATION, Plaintiff in Error,
ag'st
HENRIETTA P. SARGENT, Defendant in Error. } Joinder in Error.

And afterwards, to wit, on the second Monday of October, in said term, the said defendant in error, by Miron Winslow, her attorney, comes here into court and says that there is no error either in the record or proceedings aforesaid or in the giving of the judgment aforesaid.

And he prays that the said Supreme Court, before the justices thereof now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid in form aforesaid given may be in all things affirmed, &c.

MIRON WINSLOW,
Attorney for Defendant in Error, 120 *Broadway, N.Y. City.*

113 [Endorsed:] United States Supreme Court. Home Benefit Association, plaintiff in error, *vs.* Henrietta P. Sargent, defendant in error. Joinder in error. Miron Winslow, attorney for defendant in error. Due service of a copy of the within joinder in error is hereby admitted this 21st day of Sept., 1888. Francis Lawton, attorney for plaintiff in error. To —— ——, attorney for plaintiff in error. U. S. circuit court. Filed Sept. 22, 1888. John A. Shields, clerk.

114 Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

HENRIETTA P. SARGENT
vs.
HOME BENEFIT ASSOCIATION. } Bond for Damages and Costs.

Know all men by these presents that we, The Home Benefit Association, as principal, and The American Surety Company of New York, are held and firmly bound unto the above-named Henrietta P. Sargent in the sum of eleven thousand dollars, to be paid to the said Henrietta P. Sargent, for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 12th day of July, in the year of our Lord one thousand eight hundred and eighty-eight.

Whereas the above-named Home Benefit Association has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named Home Benefit Association shall prosecute its said writ

of error to effect and answer all damages and costs if it shall fail to make its plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

[Seal Home Benefit Association, New York, 1881.]

HOME BENEFIT ASSOCIATION,
H. C. BROWNELL, *Vice-Pres't*,
EUGENE BAKER, *Sec'y*.

[L. S.] American Surety Company, New York.

AMERICAN SURETY COMPANY
OF NEW YORK,
By RICH'D A. ELMER, *President*,
FRED. F. NUGENT, *Secretary*.

Sealed and delivered and taken and acknowledged this — day of ——, 18—, before me—

H. G. HINTON.

115 [Endorsed:] U. S. circuit court, southern district of New York. —— —— *vs.* —— ——. Bond for costs on —— ——.

UNITED STATES OF AMERICA,
Southern District of New York, } *ss:*

—— ——, being duly sworn, depose and say that he is worth the sum of — dollars over and above all his just debts and liabilities.

—— ——.

Sworn to this — day of ——, A. D. 18—, before me.

—— ——.

116 UNITED STATES OF AMERICA,
Southern District of New York,
City and County of New York, } *ss:*

On this 9th day of June, in the year 1888, before me personally came Harry C. Brownell, to me personally known, who, being by me duly sworn, did depose and say that he resides in the city of New York, N. Y.; that he is vice-president of the Home Benefit Association, the corporation described in and which executed the foregoing bond; that he knows the corporate seal of said corporation; that the seal affixed to said bond is such corporate seal and was so affixed by authority of such corporation, and that he signed his name thereto by the like authority as vice-president of said corporation; that he knows the handwriting of Eugene A. Baker, who is the secretary of said corporation, and that the signature of said Eugene A. Baker, as secretary of said corporation, to
117 said bond is genuine, and was also signed to said bond by like authority of said corporation.

Witness my hand and official seal the day and year last aforesaid.

ALBERT R. MOORE,
[L. S.] *Notary Public, New York County.*

STATE, CITY, AND COUNY OF NEW YORK, *ss:*

On this 12th day of July, 1888, before me personally appeared Richard A. Elmer, president of the American Surety Company, with whom I am personally acquainted, who, being by me duly sworn, said that he resided in the city of New York; that he is the president of the American Surety Company of New York;
118 that he knew the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate seal; that it was affixed by order of the board of directors of said company, and that he signed said instrument as president of said company by like authority, and that the liabilities of said company do not exceed its assets, as ascertained in the manner provided in section 3, chapter 486, of the Session Laws of 1881; and the said Richard A. Elmer further said that he was acquainted with Fred. F. Nugent and knew him to be the secretary of said company; that the signature of the said Fred. F. Nugent subscribed to the said instrument is in the genuine handwriting of the said Fred. F. Nugent, and was thereto subscribed by the like order of the said board
119 of directors and in the presence of him, the said Richard A. Elmer, president.

[L. S.] H. G. HINTON,
Notary Public, Kings Co., N. Y.

Cert. filed in N. Y. Co.

At a meeting of the board of directors of the American Surety Company held at the office of the company on the 9th day of June, 1886, on motion, it was "Resolved that, in pursuance of chapter 416, Laws of 1886, amending section eight hundred and eleven of the Code of Civil Procedure, the president or vice-president be, and either of them is hereby, authorized and empowered to sign, execute, and deliver any and all bonds or undertakings for or on behalf of the company and to attach thereto the seal of the company, the same to be attested by the secretary or assistant secretary."

120 CITY AND COUNTY OF NEW YORK, *ss:*

I, Frederick F. Nugent, secretary of the American Surety Company, have compared the foregoing resolution with the original thereof as recorded in the minute book of said company, and do certify that the same is a correct and true transcript therefrom and the whole of said original resolution.

Given under my hand and the seal of the company, at
[L. S.] the city of New York, this 12th day of July, 1888.

FRED. F. NUGENT, *Secretary.*

(Endorsed:) U. S. circuit court, southern district of New York, second circuit. Henrietta P. Sargent ag't Home Benefit Association. Bond. Dated July 12, 1888. I hereby consent to the entry of the within bond & approve of the same both as to form and sufficiency. Dated N. Y., July 13, 1888. Miron Winslow, pl'ff's att'y.
121 Approved. Wm. J. Wallace. U. S. circuit court. Filed Jul-16, 1888. John A. Shields, clerk.

122 UNITED STATES OF AMERICA, *ss:*

To Henrietta P. Sargent, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, eighteen hundred and eighty-eight, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Home Benefit Association is the plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated New York, July 14th, 1888.

WM. J. WALLACE.

123 [Endorsed:] E. & A. A. 748. U. S. Supreme Court. Home Benefit Association, plaintiff in error, against Henrietta P. Sargent, defendant in error. Citation. Service of the within citation is hereby admitted. N. Y., July 16, 1888. Miron Winslow, pl'ff's att'y. U. S. circuit court. Filed July 17, 1888. John A. Shields, clerk.

Endorsed on cover: S. New York C. C. U. S. No. 155. The Home Benefit Association, plaintiff in error, *vs.* Henrietta P. Sargent. Filed October 5, 1888.

Office Supreme Court U. S.
FILED,
DEC 2 1891
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1891.

No. 155.

THE HOME BENEFIT ASSOCIATION,

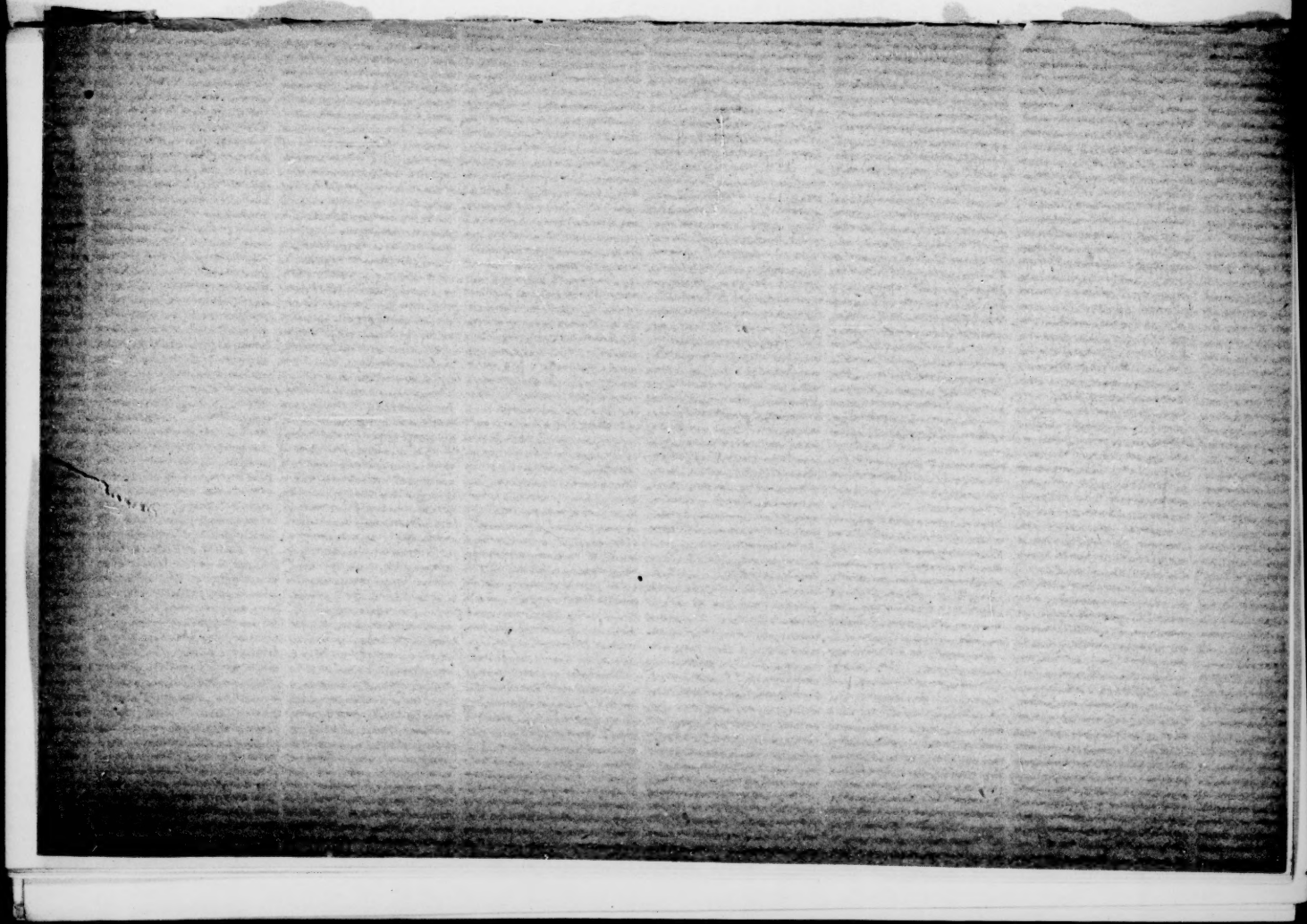
Plaintiff in Error,

against

HENRIETTA P. SARGENT.

BRIEF FOR PLAINTIFF IN ERROR.

FRANCIS LAWTON,
AUSTEN G. FOX,
Of Counsel for Plaintiff in Error,
170 BROADWAY,
New York City.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

THE HOME BENEFIT ASSOCIATION, Plaintiff in Error, vs. HENRIETTA P. SARGENT.	No. 155.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

This cause comes up by writ of error to the Circuit Court of the United States for the Southern District of New York to review a judgment entered in favor of plaintiff below upon verdict of a jury for the sum of $5,517.99. Judgment rendered June 29, 1888 (Record, p. 913, fol. 28).

The complaint (Rec., p. 4, fol. 8) alleges that the plaintiff is a citizen of Massachusetts and that the defendant below, the Home Benefit Association, is a corporation under the Laws of New York, and that on the 5th day of September, 1885, said association issued to Edward F. Hall, Jr., its certificate of membership or policy of life insurance, Exhibit A (Rec., p. 6, fol. 14), therein agreeing to pay to plaintiff the sum of five thousand dollars upon the death of the said Edward F. Hall, Jr.

And in paragraph seventh alleges "that on or about the 19th day of October, 1886, the said Edward F. Hall, Jr., the above-mentioned assured member, departed this life at the City of New York and *that his death was not caused by any of the causes excepted from the operation of said policy.*

That plaintiff has made due proofs of death, that due time has elapsed, that plaintiff is the sister and a creditor of said Edward F. Hall.

And in paragraph eleventh:

"That nothing has ever been done by this plaintiff or by said assured member Edward F. Hall, Jr., to vitiate, avoid or forfeit said certificate or policy or any of the conditions thereof."

The complaint further demands damages of $5,000 with interest.

The answer (Rec., p. 9, fol. 20) denies knowledge as to plaintiff's citizenship, admits defendant's incorporation, admits the issuing of the policy and its contents as alleged, admits that Edward F. Hall made all required payments, but denies that he complied with all the conditions of the policy.

And at paragraph fifth admits the death of the assured and proceeds: "But defendant alleges that the death of said Edward F. Hall, Jr., was caused by one of the causes excepted from the operation of the certificate or policy—that is to say, the certificate sued on herein was issued by the defendant and accepted by said Edward F. Hall, Jr., upon the following expressed condition and agreement made between the said Edward F. Hall, Jr. and this defendant, which constituted part of said certificate, viz.: 'Death of the member by his own hand or act, whether voluntary or involuntary, sane or insane, at the time is a risk not assumed by the association under this contract.' And defendant, further answering, says that the death of said member, Edward F. Hall, Jr., was brought about by his own hand and act, in that said Edward F. Hall, Jr., died from the im-

mediate effect of a shot from a pistol fired by his own hand, such shot having been so fired by him with the intention of taking his own life."

The answer further denies that satisfactory proofs of death have been furnished by plaintiff or that she has performed all the conditions of the policy; admits the lapse of time alleged, but denies that anything is due from defendant to plaintiff. It also denies knowledge as to plaintiff's being a sister and creditor of plaintiff, and denies that nothing has been done by plaintiff or Edward F. Hall, Jr., to vitiate, avoid or forfeit the policy.

On the issues presented as aforesaid the case came to trial in the Circuit Court before Hon. ALFRED C. COXE, Judge, and a jury at New York City on the 6th day of February, 1888.

Statement of Facts.

Upon the trial it appeared from the evidence that between 7 and 7:30 o'clock, upon the morning of the 19th of October, 1886, at 139 East Twenty-first street in the City of New York, in the rear hall bedroom on the fourth floor, Edward F. Hall was found alone lying upon his back toward the right side of the bed unconscious and dying, his posture composed, his limbs relaxed, the bedclothes smoothly drawn up over his chest to the armpits, the arms outside the bedclothes extended by the sides, and on the bed, within a few inches of the palm of the right hand, was a pistol; the fingers lay almost around the handle of the pistol and almost touching it, as if the hand had just relaxed and dropped the pistol (Rec., p. 21, fol. 44). It was a revolver of 38 calibre, three chambers of which had been discharged. A bullet from such a pistol, received in the brain, would cause death. There was a smell of recently burned gun-

powder in the room. There was a bullet wound (Rec. p. 20, fol. 43) in his right temple so severe as to cause fractures radiating up and down and backward therefrom, and also a comminuted fracture of the frontal bone. There was a fracture in the left temple directly opposite the wound in the right temple, and the bone was broken into several small pieces. The laceration and the amount of comminution indicated that the pistol was held very close to the temple when discharged.

There was a great deal of blood flowing from the wound, and considerable had flowed before, so that the pillow was stained with blood, and it had flowed down and collected in a pool beneath his back. No evidence of any struggle was apparent. Mr. Hall died within a few minutes of the time he was thus found. At his bedside was found the following letter addressed to his physician:

"DR. T. S. ROBERTSON, 28 East Twentieth street:

"MY DEAR DOCTOR—Will you come down to me at 137 East Twenty-first street either after your office hours this P. M. or this evening. I am suffering frightfully in my head, the top and back; have had it some days, but it has now grown in intensity, so that it is almost unbearable. I used to cure it with chloroform externally, but can't get it here without a permit. If too busy please send me what you think best.

"Yours very truly,

"EDWARD F. HALL, JR.

"SAN FRANCISCO, October 19th, 1886."

He had suffered extremely from headaches, constantly increasing in severity for many days so that the agony had become almost unendurable. It appears, further, that upon the evening prior to his death he was with a party of friends and then complained of intense pains in his head.

After the death of the assured an inquest was held at which a verdict was found that the assured came to his death by a pistol shot wound in the head self-inflicted during mental aberration. This verdict, together with all the testimony introduced on the hearing of the inquest, was all made part of the plaintiff's "proof of death," and were handed to the defendant. There was no evidence whatever to contradict any of the testimony introduced by the defendant in the action. The jury found a verdict in favor of the plaintiff for the full amount claimed, and judgment was thereupon entered, to reverse which this writ of error is brought.

Assignment of Errors.

The plaintiff in error assigns as error the following:

First. That the Court below erroneously received the evidence of the witness John Sherman Moulton as to a conversation between himself and some one in the office of the defendant below, other than Mr. Andrew S. Brownell, as to how the inquest of the Coroner on the view of the body of Edward F. Hall came to be presented to the defendant below.

Rec., p. 26, fols. 53, 54.

2d. That the Court below erroneously received the evidence of the witness Mrs. Charlotte R. Hall as to the views and plans for the future of her husband Edward F. Hall in his lifetime, which evidence was to the effect that in the month of July, preceding his death, her husband was preparing rooms and arranging for her return to him.

Rec., p. 31, fol. 62.

3d. That the Court below erroneously received the the evidence of the witness Mrs. Charlotte R. Hall as

to the interest manifested by her husband Edward F. Hall in his lifetime in his son, and the degree of interest felt by her said husband in his son's prosperity and career in college and the plans made by her said husband for the future of his son. Which evidence was to the effect that all her said husband's future hopes were in connection with his son.

Rec., pp. 31, 32, fols. 62, 63.

4th. That the Court below erroneously received the evidence of the witness Henrietta P. Sargent, as to the general conduct and hopeful condition of temperament of her brother Edward F. Hall in his lifetime. While suffering from severe headache, which evidence was to the effect that he was always cheerful and bore them bravely.

Rec., p. 32, fols. 64, 65.

5th. That the Court below erroneously received the evidence of the witness Andrew S. Brownell, secretary of the corporation defendant below, upon cross-examination as to a statement by him to the agent of the plaintiff below that he had known the assured, Edward F. Hall, well in California, and that if it depended on the witness the loss should be paid without any delay. Which evidence was to the effect that the witness thought he had expressed such a personal feeling.

Rec., p. 34, fols. 67, 68.

6th. That the Court below erroneously refused to receive the evidence of the witness Andrew S. Brownell, secretary of the defendant below, offered by the defendant below as to the substance of a conversation had after the death of the insured and between the 15th and 20th of November, 1886, or thereabouts, between said Brownell as such secretary and Charles W. Moulton as agent or attorney of the plaintiff below, with regard to the claim on the policy now in suit.

Rec., p. 17, fols. 36, 37.

7th. That the Court below erroneously refused to receive the evidence of the witness Andrew S. Brownell, secretary of the defendant below, offered by the defendant below, as to the conversation referred to in assignment of error No. 6, *supra*, with Charles W. Moulton after the said Moulton had been shown by the evidence of the plaintiff below to have been her agent or attorney.

Rec., p. 33, fols. 65, 66.

8th. That the Court below erroneously refused to direct a verdict for the defendant below, asked for on the ground that the plaintiff below failed to show that she ever presented to the defendant below satisfactory evidence of the death of Edward F. Hall, the assured, by the policy in suit, or that she ever presented any evidence of his death, the policy of insurance containing specific provisions as to the facts which are required to be proved, and the manner in which they are to be proved.

Plff.'s Ex. No. 1., Rec., p. 15, fols. 32, 33.

9th. That the Court below erroneously refused to direct a verdict for the defendant below, asked for on the ground that the evidence shows that Edward F. Hall, the assured in the policy in suit, died by his own hand.

Rec., p. 35, fol. 69.

10th. That the Court below erroneously charged the jury, as follows: "But the defendant comes into court "and asserts that the contract under which the action "is brought has not been fulfilled, but has been vio- "lated by the assured. Being an affirmative defense, "the onus is upon the defendant to satisfy you by evi- "dence which, in your judgment, outweighs the evi- "dence of the plaintiff that the defense has been es- "tablished."

Rec., p. 36, fol. 71.

11th. That the Court below erroneously charged the jury as follows: "The defendant has introduced in evi- "dence proof of death furnished by the plaintiff to the "defendant, in order to induce the pay- "ment of this money, and it is insisted upon "the part of the defendant that the plaintiff, hav- "ing produced these proofs for the purpose of "inducing the defendant's to pay this sum, is "now estopped from saying that the cause of death "there assigned was not truly assigned. You will "recollect, without going into the proofs in detail, that "they assert generally that Edward F. Hall met his "death by suicide while laboring under temporary "aberration of the mind. I think I state it substan- "tially as it is stated in the proofs, and the contention "of the defendant is that that closes the discussion. I "do not think it necessary to say further upon that "point, gentlemen, than that these proofs are properly "in the case. They are proper evidence for you to "consider. They are by no means conclusive evidence, "but they are evidence which should be taken by the "jury in connection with the other testimony in the "case, and given such weight upon determining the "main question as the jury may see fit to give them."

Rec., p. 37, fols. 73, 74.

12th. That the Court below erroneously charged the jury as follows: "The only question on this proof is "did Edward F. Hall commit suicide? If he did, the "policy is void; if he died in some other way, by acci- "dent or assassination, it would be otherwise. Upon "that issue the burden is upon the defendant to satisfy "you by a fair preponderance of proof of the truth of "this defense."

Rec., p. 36, fol. 71.

13th. That the Court below erroneously refused to charge the jury in terms that, although the burden of

proof is upon the defendant to show that Edward F. Hall died by his own hand, yet the defendant is not bound to prove that fact beyond a reasonable doubt, but only by a fair preponderance.

Rec., p. 39, fol. 77.

14th. That the Court below erroneously refused to charge the jury in terms that the proofs of death were intended for the action of the company and upon their truth the company had the right to rely and unless "corrected for mistake" the plaintiff is bound by them.

Rec., p. 39, fol. 77.

15th. That the Court below erroneously refused to charge the jury in terms that in this case there is no evidence of any mistake in the proofs of death and that the statements therein are conclusive upon the plaintiff.

Rec., p. 39, fol. 77.

16th. That the Court below erroneously refused to charge the jury in terms that the plaintiff, having in her proofs of death stated to the company that the death was by suicide, it is incumbent upon her to prove by a preponderance of evidence that the statement was mistaken and the death was the result of accident.

Rec., p. 39, fol. 78.

17th. That the Court below erroneously refused to charge the jury in terms that if the death of Edward F. Hall ensued from any physical movement from the hand or body of the assured, even though proceeding from a partial or total eclipse of the mind, the defendant is entitled to a verdict.

Rec., p. 40, fol. 78.

18th. That the Court below erroneously refused to

charge the jury, in terms, that if the jury finds the fact that Edward F. Hall shot himself in any manner except as by mere accident, then the defendant is entitled to a verdict, no matter whether Hall was sane or insane or whether his act was voluntary or involuntary or whether he knew what he was doing or not.

Rec., p. 40, fol. 78.

19th. That the Court below erroneously refused to charge the jury, in terms, that it is not necessary for the defendant to show that Edward F. Hall was capable of understanding the nature and consequences of his own act, and if they find as a fact that he shot himself while suffering from pain, or driven by an uncontrollable impulse to do so, still the defendant is entitled to a verdict.

Rec., p. 40, fols. 78, 79.

20th. That the Court below erroneously refused to charge the jury, in terms, that the plaintiff's proofs of death having been presented in her name and by her agent in the matter and constituting the essential preliminary to her action, they must stand as her acts and the representations made therein must be taken as true until at least some mistake is shown to have occurred in them.

Rec., p. 40, fol. 79.

21st. That the Court below erroneously refused to charge the jury, in terms, that if the jury find that the narration of the manner of the death of the deceased was so interwoven with the statement of his death that the two things were inseparable and that the statements in the proofs of death show that the plaintiff by such proofs of death claimed that the deceased died by his own hand during a moment of mental aberration, then the defendant is entitled to a verdict.

Rec., p. 40, fol. 79.

22d. That the Court below erroneously refused to charge the jury in terms that the plaintiff has failed to give any evidence that the death was accidental.

Rec., p. 40, fol. 79.

23d. That the Court below erroneously refused to charge the jury in terms that the deceased is shown by the complaint and proofs of loss, over and above the oral testimony as to the circumstances of his death, to have died in fact by his own hand and act, and that whether he was sane or insane at the time or suffering only from mental aberration the defendant is entitled to a verdict.

Rec., pp. 40, 41, fols. 79, 80.

24th. That the Court below erroneously refused to charge the jury in terms that the defendant is not bound to exclude every possible theory of accident.

Rec., p. 41, fol. 80.

25th. That the Court below erroneously refused to charge the jury in terms that the presumption is against the theory of murder.

Rec., p. 41, fol. 80.

POINTS.

First Point.

The declaration of the defendant's secretary that if it depended on him the loss would be paid without delay (Rec., p. 34, fols. 67, 68) was irrelevant and very prejudicial to the defendant.

First. The Secretary's declaration was inadmissible.

21 Wall., 151, Ins. Co. vs. Mahone.
28 N. Y., 153, 159, 160 Baptist Ch. vs. B. F. Ins. Co.
102 Mass., 557, Pratt vs. O. & L. C. R. R. Co.

Second. The defendant had done nothing to make the evidence admissible.

Mr. Brownell, the secretary, was called first by the defendant (p. 5), but his testimony as to conversations was *excluded* (p. 8 and p. 39).

Jno. S. Moulton, called for *plaintiff*, is the first witness who opens the matter of conversations with Brownell, and this on Moulton's direct examination.

Brownell was then called to give his version of the interview, and then on cross-examination the plaintiff asks for Brownell's admission as independent evidence that, in his opinion, at least, the plaintiff has a good case (*p. 41*).

Third. This error was not cured in any way.

The defendant's effort to weaken the effect of this most damaging admission could not have that effect.

In Ins. Co. v. Mahone, *supra*, the Court said, in speaking of an admission that, in the opinion of an agent, "It would be best for the defendants to accept "the situation and pay the amount of the policy," said: "That such an opinion, allowed to go to the jury, must

"have been very hurtful to the defendant's case is "manifest." And the judgment in that case was reversed upon that ground.

See also 54 N. Y., 334, 342, Anderson vs. R. W. & O. R. R. Co.

Second Point.

The Court erred in refusing to allow defendant to prove what was said by C. W. Moulton when he presented the plaintiff's claim to the defendant association (Rec., p. 17, fols. 36, 37), and see 6th Assignment of Error (Rec., p. 62).

Even if this evidence was not admissible when called for first, still after the plaintiff herself had called one of her agents, Jno. S. Moulton, and had opened up the matter of communications and representations concerning the presentation of the claim and proofs, it would seem as if the defendant should have been allowed to prove (p. 33, fols. 65–66, and see 7th Assignment of Error Rec., p. 62) what the father of Jno. S.—the plaintiff's principal agent—said, *in the same connection to the same officer* (pp. 8, 26, 39).

Especially is this so when the plaintiff *claimed* by this evidence to have weakened the effect of the written statements made in her behalf. It would seem most proper to show that her principal agent always claimed that the death was by suicide, but that by reason of mental aberration it was not a death by the act of deceased within the meaning of the policy.

Third Point.

The proofs of death (including the Coroner's inquest presented therewith and as part thereof), presented in the name of the plaintiff by her agent constitute, apart from the oral testimony introduced at the trial an admission against interest by the plaintiff uncorrected, unexplained by any evidence and not withdrawn by her, that the deceased came to his death by his own hand. Such an admission is sufficient in and of itself to make the direction of a verdict in his favor the legal right of the defendant.

The errors of the Court below by which, as we contend, the defendant was deprived of the right are set forth in assignments of error Nos. 9 and 11, p. 63; Nos. 14, 15, 16 and 20, p. 64, and No. 23, p. 65.

These admissions are proper evidence, and as such they were allowed to go to the jury.

They are of that class of admissions which *may be* rebutted, but which until corrected, explained or withdrawn bind those on whose behalf they are made.

Therefore as soon as the admissions were before the jury as evidence, the burden was laid upon the plaintiff to rebut that evidence, by way of correction, explanation or withdrawal, and the Court's refusal to so instruct the jury was error within the following cases:

29 Feb. R. 198, *201*, Keels vs. Mut. Res. Fund Life Ass.
22 Wall, 32, Ins. Co. vs. Newton.
10 Allen, 213, Campbell vs. Charter Oak Ins. Co.
112 Mass, 49, Johnson vs. Phœnix Ins. Co.
1 Bosw., 50, Irving vs. Excelsior Ins. Co.

The decision in 102 N. Y., 486, Goldschmidt vs. Mut. Life Ins. Co., is not in conflict with those cases, for, in the latter case, there was distinctly no admission or as-

sertion of the truth of the statements attached to the Coroner's jury, but a distinct denial of the truth.

In the present case, however, as in the case of Ins. Co. vs. Newton, the plaintiff herself swore to the statement referring to the affidavit of Dr. Jenkins for the true statement of the manner of Mr. Hall's death. It *contained* the *truth*, as it was known to all *at the time*.

In Keels vs. Mut. Res. Assn., *supra*, the Court said: "*It meets the presumption that the death was accidental,* "*and puts on her* (the plaintiff) *the burden of showing* "*mistake.*"

It is submitted, with great respect, that by the charge of the Court, the defendant was deprived of the right to have the jury consider the admissions as *being sufficient of themselves* to entitle the defendant to a verdict and the jury, practically, were left under the impression that the defendant was bound to *prove suicide* outside of those admissions (see 2d, 4th, 8th and 9th Requests to Charge).

The plaintiff gave no evidence whatever tending to show that either she, or her agents, had been under any mistake or misapprehension in admitting suicide to be the cause of death.

Taking the charge and the refusals to charge together it is submitted, most respectfully, that the result is this:

Although, in the language of the charge, the proofs of death "assert generally that Edward P. Hall met "his death by suicide while laboring under temporary "aberration of the mind," and although they are admitted as *admissions of that fact*, and although they are not contradicted, explained or corrected, yet they are not *sufficient* evidence to entitle the defendant to a verdict, and the jury may disregard them, even in the absence of any explanations of them or of any proof of error or mistake in them.

See 8th Request, p. 54.

When they were admitted, being admissions of suicide

made against interest, it is submitted that the fact that they were admitted necessitated a ruling that the onus was on the plaintiff to meet them.

Fourth Point.

The Court erred in charging the jury as follows: "Did Edward F. Hall commit suicide? If he did the policy is void. If he died in some other way by accident or assassination it would be otherwise. Upon that issue the burden is upon the defendant to satisfy you by a fair preponderance of proof of the truth of this defense." "The defendant comes into Court and asserts that the contract under which the action is brought has not been fulfilled by the assured. Being an affirmative defense the onus is upon the defendant to satisfy you by evidence which in your judgment outweighs the evidence of the plaintiff that that defense has been established."

This charge we claim is erroneous in these particulars.

It not only permits the jury to find that the assured died by accident or assassination, but casts upon the defendant the burden of proving that the assured did not die by accident or assassination.

1. There was no evidence whatever in the case, nor any claim made, by which the jury could find as an affirmative fact that the deceased died by accident or assassination. Nor was any claim made in the proofs of loss presented to the defendant which are a part of this case that either was the cause of his death. The charge was, therefore, misleading and confusing to the jury, as it led them to believe that it was incumbent upon the defendant to satisfy them, or introduce some evidence to the effect that the death could not have been the result of an accident or assassination.

2. By charging the jury that the evidence of the defendant must outweigh that of the plaintiff, the Court again gave to the jury an erroneous view as to the burden of proof. There was no contradiction whatever as to the evidence in the case, and the Court in summing up used the following language: "I think, gentlemen, that you will be able perhaps to arrive at a clearer understanding of this case when you realize that there is no dispute upon the material facts here. I do not recall (perhaps you may do so) any fact sworn to by any witness which is contradicted by any other witness which bears upon the merits of this controversy. *The dispute arises as to presumptions which are drawn from undisputed facts.*" This, therefore, left the case to the jury upon the presumptions they might derive from the evidence. There was nothing to be outweighed unless a presumption existed from the admitted facts that the death resulted from accident or assassination. The charge of the Court erroneously led the jury to believe that such a presumption did exist, and that the defendant's evidence must outweigh it--that is, defendant must prove affirmatively that Edward F. Hall did not meet his death by accident or assassination and could not succeed unless he did so.

Fifth Point.

The judgment should be reversed.

FRANCIS LAWTON,
AUSTEN G. FOX,
Of Counsel for Plaintiff in Error.

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Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 155.

THE HOME BENEFIT ASSOCIATION,
Plaintiff in Error,

vs.

HENRIETTA P. SARGENT,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

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181 Broadway, New York City.

Evening Post Job Printing House, N. Y.

Supreme Court of the United States.

OCTOBER TERM, 1891, No. 155.

THE HOME BENEFIT ASSOCIATION,
Plaintiff in Error,

vs.

HENRIETTA P. SARGENT,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

Statement.

This action was brought by the defendant in error, as plaintiff in the Court below, against the plaintiff in error, as defendant, to recover from said defendant five thousand dollars, with interest thereon from the 15th day of March, 1887, on a certificate or policy of life insurance, made and delivered by said defendant to the plaintiff on the life of Edward F. Hall, Jr., dated September 5, 1886, whereby the said defendant stipulated and agreed to pay to the said plaintiff five thousand dollars within ninety days from the receipt of satisfactory evidence of the death of said Edward F. Hall, Jr., during the continuance of said certificate in force (Record, pp. 4-9; Plaintiff's Exhibit 1, Record, pp. 41-44).

The plaintiff was a creditor of said Edward F. Hall, Jr., for the sum of five thousand dollars, and the said certificate or policy was made to secure the payment to her of said indebtedness of said Edward F. Hall, Jr., in the event of his death (Record, pp. 5–14).

The said indebtedness had not been paid at the time of the death of said Hall (Record, p. 14), and the said policy was at that time in full force and effect.

The answer of the defendant admitted the making and delivery of said certificate or policy of insurance, and that said Edward F. Hall, Jr., paid to the defendant all the sums of money and assessments stipulated for in the said certificate or policy, and the death of said Hall, (Record, p. 10).

On or about the 19th day of October, 1886, the said Edward F. Hall, Jr., departed this life at the City of New York (Record, p. 14). Thereafter, and sometime prior to the 13th day of December, 1886, the plaintiff furnished to the defendant proofs of death of the said Edward F. Hall, Jr., (Record, pp. 15–16; Defendant's Exhibit D, Record, pp. 49–57).

The complaint alleged and the answer admitted that more than ninety days had elapsed since proofs of death were delivered by the plaintiff to the defendant and payment demanded (Record, pp. 510); but the defendant denied that the plaintiff furnished to the defendant satisfactory proofs of the death of said Edward F. Hall, Jr. (Record, p. 10).

The answer contained the following allegation: "FIFTH. Answering the allegations in the seventh "paragraph of said complaint contained, defendant "admits that on or about the 19th day of October, "1886, the said Edward F. Hall, Jr., departed this "life at the City of New York; but the defendant "alleges that the death of said Edward F. Hall, Jr., "was caused by one of the causes excepted from the "operation of this certificate or policy, that is to

"say, the certificate sued on herein was issued by "the defendant and accepted by said Edward F. "Hall, Jr., upon the following expressed condition "and agreement made between the said Edward F. "Hall, Jr., and the defendant, which constituted "part of said certificate, viz.: 'Death of the mem- "'ber by his own hand or act, whether voluntary "'or involuntary, sane or insane at the time, is a "'risk not assumed by the association under this "'contract;' and defendant, further answering, "says that the death of said member, Edward F. "Hall, Jr., was brought about by his own hand and "act, in that said Edward F. Hall, Jr., died from "the immediate effect of a shot from a pistol fired "by his own hand, such shot having been so fired "by him with the intention of taking his own life" (Record, p. 10).

The action came on for trial before Hon. Alfred C. Coxe, Justice, and a jury, on the 6th, 7th and 8th days of February, 1888, and the jury found a verdict for the plaintiff for $5,350 (Record, p. 41).

A motion was made by the counsel for the defendant on the minutes of said Judge, at the same Term, to set aside said verdict, and for a new trial to be granted upon the exceptions taken on behalf of said defendant, and said motion was denied, (Record, p. 12).

Summary of the Evidence in the case as to the circumstances of Mr. Hall's death.

The only positive facts which were established, with relation to the manner of Mr. Hall's death, were, that on the morning of the 19th of October, 1886, a nurse girl in the house where Mr. Hall lived who was in the hall on the same floor on which was Mr. Hall's room, heard somebody calling for help.

This nurse girl called to a girl, who was in the hall on the second floor of the house, saying that some one up there was calling for help. This girl immediately ran upstairs to Mr. Hall's room, and found the door open. She went in and saw Mr. Hall lying upon his bed, in a dying condition, with blood coming out of his mouth, and blood on the right side of his face. She did not hear any pistol shot. She did not see any pistol when she first went into the room, and not until she came back from the doctor's. She then went for a doctor, and he came to the house (Record, pp. 22, 23). When the doctor came he found that there was a wound on the right side of Mr. Hall's head, from which brain matter and blood were flowing, and the bone was very much fractured. Mr. Hall was unconscious when the doctor arrived. This was about 7 o'clock in the morning, or a little after 7. Mr. Hall died at 7.40 A.M. Mr. Hall was lying on his back with his limbs stretched out, composed, his arms stretched out, composed, his hands lying by his side, the right hand relaxed and composed. The clothing was pulled up pretty well over his chest, nearly up to the armpits, and lying smoothly. Both hands were lying outside of the clothing, and a pistol lay on the bed within a few inches of his right hand. No evidence was given to identify this pistol in any way as having belonged to Mr. Hall, or that he owned any pistol at the time of his death. No pistol shot had been heard by any one in the house. The doctor did not probe the wound, and he testified that he did not know of his own knowledge what had penetrated the skull (Record, pp. 17, 18; 19). No post-mortem examination was made to ascertain the cause of death, and no inquest was had upon the body.

POINTS.

I.

The verdict of the jury ought not to be disturbed. The evidence in the case presented a question of fact to be determined by the jury, and the jury have determined this question in favor of the plaintiff.

The burden of proof was upon the defendant to sustain the defense of suicide alleged in its answer. Where an issue is properly joined, he who asserts the affirmative must prove it.

Simonton *vs.* Winter (5 Peters, 140).
Cranston *vs.* N. Y. C. & H. R. R. R. Co. (103 N. Y., 614).
Starkie on Ev. (9th Am. Ed.), 585, 586.

It has been held in numerous cases where the action was on a policy of life insurance, and the defense was that the insured died by his own hand; that the defendant had the affimative of the issue.

Murray *vs.* New York Life Ins. Co. (85 N. Y., 236).
Goldschmidt *vs.* Mut. Life Ins. Co. (102 N. Y., 486).

In Murray *vs.* New York Life Ins. Co. (*supra*), the complaint alleged that the death of the insured was not caused by the breaking of any of the conditions and agreements in either of the polices. The answer of the defendant denied this allegation, admitted the death, and set up that the insured died in consequence of a violation of the Laws of the State of New York, &c. The Court said: "The rule is well established that "in an action upon a policy of insurance, "when the answer admits the issuing of the "policy, and the allegations in the complaint and

"alleges a breach of its conditions, the burden of "proof is upon the defendant, and the plaintiff is "entitled to recover unless the defendant satisfies "the Court or jury by a preponderance of evidence "that the conditions had been broken (Jones *vs.* "Brooklyn Life Ins. Co., 61 N. Y., 79; Van Volken-"burg *vs.* Am. Pop. Life Ins. Co., 70 N. Y., 605; "Elwell *vs.* Chamberlain, 31 N. Y., 611)."

On doubtful facts the presumption is against suicide.

Kells *vs.* Mut. Reserve Fund Assn. (29 Fed., Rep. 198).

Mallory *vs.* Travelers' Ins. Co., (47 N. Y., 52).

In Mallory *vs.* Travelers' Ins. Co. (*supra*), the policy was one embracing cases where the death was caused by an injury received from an accident, and the Court, after reviewing the evidence said: "From the facts above stated it appeared either that the death was caused by such an injury or the suicidal act of the deceased, but the presumption is against the latter. It is contrary to the general conduct of mankind; it shows gross moral turpitude in a sane person."

II.

No direct proof was given to show that Mr. Hall died from the immediate effect of a pistol shot fired by his own hand, with the intention of taking his own life.

(1st.) It was not proved that the wound in Mr. Hall's head was caused by a pistol shot The wound was not probed (Record, p. 19). No proper

examination was made to ascertain whether a ball had penetrated the skull or not. Dr. Conway, the physician who was called in first to attend Mr. Hall, and who was a witness for the defendant, was asked:

Q. Do you know whether anything, and if so, what, had penetrated that skull, of your own knowledge?'

A. No; I did not probe the wound; it was not necessary (Record, p. 19).

The only examination which he made was an external examination; and he testified: "It is a fact "that I associated that pistol with his wound, and "my operations of mind were based upon that as- "sumption. I noticed no burning of the skin nor of "the hair." * * * There was no hole on the "opposite side of the head" (Record, p. 19). He "had previously testified on his direct-examination that he did not remember of there being any powder about the wound, that he did not remember any there (Record, p. 18).

Dr. William F. Jenkins, the Coroner's physician, who examined the wound externally, said: "I do "not remember that I saw any evidence of burning "either of the hair or the flesh" (Record, p. 28). "There was no smell of powder in the room when "I was there." * * * "I do not remember any "blood, or brain or ooze upon that pistol when I "received it" (Record, p. 29).

Herman R. Dickman, the undertaker, who had charge of the body of Mr. Hall, testified: "There "was no burning of the hair or of the face, nor any "grains of powder in the flesh" (Record, p. 30).

No pistol shot was heard in the house.

Lizzie Spec, a witness for the defendant, who was employed in the house where Mr. Hall lived, and who was the first person who went into Mr. Hall's room after the accident, testified: "I did not hear "any pistol shot. A nurse girl belonging to a lady

"in the house halloaed, and said there was some-
"body calling for help, and that caused me to go.
"She was in the hall. I do not know where she
"came from. She did not mention Mr. Hall's
"name. She said somebody called for help up
"there. I said if somebody called for help, why
"don't you see? I saw her after that; she came
"right by me as I went into the room; she was
"right by me when I went into the room. The
"door was open about that much (indicating). I
"heard no pistol shot. The girl was on the same
"floor with Mr. Hall, where Mr. Hall was, when
"she called to me, and being on that floor she
"called out to me that somebody was calling for
"help, and I went right upstairs; and she was near
"me when I was about to enter the room; the door
"was open, and I went in far enough to see that
"Mr. Hall was in distress. I saw the blood. I saw
"that he was dying. I did not see any pistol till I
"came back from the doctor's; there was quite a
"crowd in the room when I came back, and then I
"saw the pistol for the first time" (Record, p. 23).

Gertrude Graham, a witness for the defendant, who was in the house at the time of Mr. Hall's death, testified: "I did not hear any pistol shot" (Record, p. 24). Mrs. Philena Munroe, the landlady of the house in which Mr. Hall lived, testified: "I did not hear any pistol shot on that occasion" (Record, p. 27). She testified also that the statement by her in the paper purporting to be made at the Coroner's office that a pistol shot was not heard by any one in the house, was true as far as she could remember. She said: "I was informed by my husband that it "was a pistol shot wound, and that was what I "based my statement upon" (Record, p. 27).

There was, therefore, no positive evidence presented on the trial by the defendant to show that the cause of Mr. Hall's death was a pistol shot wound; and

there was no direct evidence whatsoever on the trial that Mr. Hall died from the immediate effect of a pistol shot fired by his own hand with the intention of taking his own life, as alleged in the answer.

On the contrary, all the evidence produced on the trial, tended strongly to sustain the contention of the plaintiff that the death of Mr. Hall might have been caused by assassination, or might have been the result of an accident.

These facts are:

(*a.*) The call for help. It is not to be supposed that if Mr. Hall intended to commit suicide, he would call for help; and yet, these calls for help were loud enough for the girl who was in the hall to hear them, and to attract her attention to the fact that somebody was calling for help (Record pp. 22, 23). Furthermore, this cry for help could not have been uttered by Mr. Hall, if, as Dr. Conway testified (Record, p. 19), instant unconsciousness would have been the immediate and instantaneous effect from receiving into his brain a slug discharged from a pistol of the calibre of the pistol found in Mr. Hall's room. These calls for help were consistent with the theory that a robber or assassin entering Mr. Hall's room attacked him with some heavy penetrating weapon, and struck him before he had time to discharge his pistol.

(*b.*) No pistol shot was heard. Mr. Hall's door was open. There was a servant in the hall near his room on the same floor, and a servant in the hall on the floor below. The girl, who had heard the calls for help, would undoubtedly have heard it, if a pistol shot had been fired.

(*c.*) Mr. Hall's door was found open when Lizzie Spec went upstairs. It is a circumstance to show that an assassin might have escaped from the room leaving the door open in his flight. If Mr. Hall had

intended to commit suicide, he would not have left his door open.

(*d.*) The composure of Mr. Hall's limbs, the bedclothes smoothly drawn up over his body, the pistol lying a few inches from his relaxed hand, are all circumstances incompatible with suicide, but which are perfectly consistent with the theory that an assassin might have surprised and slain Mr. Hall before he could rise from his bed, and then have laid the pistol near to his hand to give to the act the appearance of suicide.

(*e.*) The absence of any powder or signs of burning on the skin, or about the wound, as testified to by several witnesses, was entirely opposed to the theory of suicide; especially if, as Dr. Conway testified, "the laceration and the amount of comminution "indicated *the pistol was held very close*" (Record, p. 18). The presence of the pistol afforded no evidence that Mr. Hall shot himself with the intention of taking his own life. The evidence showed that Mr. Hall was in the habit of carrying a loaded pistol, and that he always had one under his pillow (Record, p. 31). The fact that it lay on his bed proves nothing. He may have been attacked by a robber, as his cries for help, heard by the nurse girl, give reason to suppose he was, and he may have drawn his pistol in self-defense, and dropped it from his nerveless grasp when the assassin struck him. If he had committed suicide his hand would have clinched the pistol in the grasp which death makes rigid. Instead of this, the hand was relaxed, the arm stretched out and composed, and the pistol lying at some distance, at least a few inches, from his hand (Record, p. 19).

If he had discharged the slug from the pistol into his own brain, producing, as Dr. Conway testified it would, instant unconsciousness, he could not have

laid the pistol down at his side, and withdrawn his hand from it, so that it would be found lying at a distance, even of a few inches, from his hand.

Furthermore, no evidence was produced to show that the pistol found on Mr. Hall's bed belonged to him, or that he owned a pistol at the time of his death. The pistol found on the bed may have been laid there by some other person than Mr. Hall.

(*g.*) No motive was shown for Mr. Hall to commit suicide. It did not appear that he was in any way pecuniarily embarrassed. His wife testified that he was a very temperate man, and that he was very sanguine, and very hopeful (Record, p. 31). His domestic relations appear to have been of the happiest description. His wife testified that his manner towards his family was most affectionate, and that he was attentive to their happiness and safety. He was devoted to his son who was a student at Yale College, and deeply interested in his future. He was making arrangements, at the very time of his death, for his wife's return to him, as she had been absent from him for some time on account of illness; and was preparing and arranging rooms for her (Record, p. 31). Although he suffered from headaches, his sister testified that he was always cheerful, and bore them bravely (Record, p. 32).

(*h.*) The evidence showed that on the night of the accident Mr. Hall did not contemplate suicide. Mr. Johnson testified that Mr. Hall was at his house that night, and invited him to meet him downtown next day to lunch with him (Record, p. 25).

Mr. Williard, who went home with him from Mr. Johnson's, testified that he was perfectly natural, genial and agreeable, and that the conversation between them was sustained by him in the same natural manner all through (Record, p. 30), which

would certainly not be the fact if the man was contemplating self-murder.

The letter found on his table written to Dr. Robertson shows that he was not thinking of suicide. He asks the doctor to meet him, either after his office hours that afternoon, or that evening; or if he is too busy, to please send him what he thinks best (Record, p. 44).

This letter shows that although he was suffering with headache his mind was clear, that he did not wish the doctor to take the trouble to come to see him during the doctor's office hours, nor if he was too busy. It shows, too, that he did not have a thought of suicide, because he asks the doctor to come down that afternoon or evening, showing he had no anticipation or intention of committing suicide. He inadvertently dated his letter San Francisco; but this was very natural. He had lived in San Francisco for upwards of twenty years. Only the evening before he had been talking with Mr. Williard, on his way home from Mr. Johnson's house, about California; and the memory and the impressions of that conversation, and of the matters connected with California, which they had talked about, were probably still strong in his mind and occupying his thoughts; so that, together with the fact that he was suffering from headache, which rendered his thoughts somewhat confused, he wrote San Francisco instead of New York, as such mistakes are frequently made by the most clear-minded persons when they are writing hurriedly, or when their thoughts are distracted for a moment by the recoltion of some circumstance of their former life passing through their minds.

Mrs. Charlotte E. Hall, the wife of Mr. Hall, testified that she did not think there was anything agitated or strange about the handwriting; that it was his usual handwriting (Record, p. 32). Could that be

so, if Mr. Hall had in his mind, when he wrote the letter, the intention of killing himself? Letters written by suicides, at the time when they are about to kill themselves, invariably contain some reference to the act about to be committed, some farewell word spoken, or some last wish expressed. In this letter there was not a word to intimate that Mr. Hall had such a thought as suicide in his mind.

There was no evidence therefore to show either a motive or an intention of Mr. Hall to commit suicide.

(2d) Even if the theory of murder is not accepted, the evidence in the case fully warranted the presumption that, if the pistol was discharged, and, if the wound was inflicted thereby, it was discharged accidentally. In addition to the calls for help which lead to a supposition that he might have met with an accident by an accidental discharge of the pistol, and called for some one to come to his assistance, there is the circumstance testified to by Dr. Jenkins that the pistol found in Mr. Hall's room went off at half-cock (Record, p. 29). Dr. Jenkins testified that three of the cartridges in the pistol were discharged (Record, p. 29). Mr. Hall may have thought that all the cartridges were discharged, and while examining it to see if it was loaded, or trying to get out the empty cartridges, the hammer may have slipped, the pistol going off at half-cock, and the pistol have been discharged. From the evidence before them the jury had a right to consider that some accident of this kind caused the discharge.

III.

But if the Court should not come to the conclusion that the evidence warranted the finding that the death of Mr. Hall might have been the result of

assassination, or of an accident; or should be of opinion that the defense of suicide was established; it cannot set the verdict aside on this ground, because the evidence presented a question of fact for the jury to determine.

Insurance Co. *vs.* Rodel (95 U. S., 232).
Phenix Ins. Co. *vs.* Doster (106 U. S., 30, 32).
Manhattan Life Ins. Co. *vs.* Broughton, (109 U. S., 127).
Conn. Mut. Life Ins. Co. *vs.* Lathrop, (111 U. S., 615).
Rounds *vs.* Del., Lack. & W. R. R. Co., (64 N. Y., 138).
Meacham *vs.* N. Y. S. M. B. A. (120 N. Y., 238, 243).
Kenyon *vs.* K. T. and M. M. Ass'n (122 N. Y., 247, 248).

In Meacham *vs.* N. Y. S. M. B. A. (*supra*) the action was on a certificate or policy of insurance. The defendant's by-laws provided that it would not be liable when a member had died from suicide within two years from date of certificate of membership. Held that the question as to a breach of the condition was a question of fact for the jury. Parker, *J.*, said: "An inference of fact was permissible from "the whole testimony that the act was involuntary. "Whether it was or was not, therefore, presented a "question of fact for the jury."

The verdict of the jury is conclusive in this Court upon the question of fact.

Kimbro *vs.* Bullitt (22 How., 226).
The Abbotsford (98 U. S., 445).
Ins. Co. *vs.* Folsom (18 Wall., 249).
Barney *vs.* Schneider (9 Wall., 251).

If it was proper that the issue should be submitted

to the jury, then the verdict of the jury must be conclusive upon the issue submitted to them.

It is a rule of law laid down by the decisions of this Court that, where there is some evidence which tends to prove either side of an issue of fact, the issue must be submitted to the jury.

Drakeley *vs.* Gregg (8 Wall., 242).
Hickman *vs.* Jones (9 Wall., 197).
Richardson *vs.* City of Boston (19 How., 253, 269.)

Can it be said that there was no evidence in this case from which the jury could draw an inference that the death of Mr. Hall might have been either the work of an assassin or accidental?

Will the Court say that the facts proved on the trial that there was a call for help heard; that the door of Mr. Hall's room was found open; that no pistol shot was heard; that he was found lying upon his bed, with his limbs composed, his hand relaxed, the pistol, not clinched in the hand but at some distance from his hand; that the bed clothes were drawn up smoothly over his body, not as if he had risen from the bed, nor as if there had been a struggle, but as if he had been stricken down on his pillow, surprised in his sleep, waking only to receive the assassin's blow, to utter a call for help, to grasp his pistol, only to drop it from his grasp as the death blow fell; the unseemly haste with which he was hurried off to the undertaker's without an examination being made of the wound to ascertain its nature, or inquest held by a coroner's jury, as the law requires, to determine what was the cause of the death; can the Court say that these facts do not afford any evidence, however slight, that the death of Mr. Hall was not the result of suicide?

Do the circumstances proved on the trial so conclusively establish that the death of Mr. Hall was caused by suicide; that there was no other inference,

which the jury could properly draw, than that Mr. Hall shot himself with the intention of taking his own life? If not, then the question was one for the jury to determine, and their verdict is conclusive and irreversible.

IV.

The first assignment of error says: "That the "Court below erroneously received the evidence of "the witness, John Sherman Moulton, as to a con- "versation between himself and some one in the "office of the defendant below, other than Andrew "S. Brownell, as to how the inquest of the Coroner "on the view of the body of Edward F. Hall, came "to be presented to the defendant below," (Record, p. 62).

(1st.) This assignment of error does not comply with the rules of this Court which says: "When the "error alleged is to the admission or to the rejec- "tion of evidence, the specification shall quote the "full substance of the evidence admitted or rejected" (Rule 21, par. 6).

There were two objections taken by the defendant's counsel to the admission of the testimony of John Sherman Moulton, as to how the paper purporting to be a Coroner's inquest came to be presented, and it does not appear, by this assignment of error, to which of the rulings of the Court on these objections the assignment of error applies (Record, p. 26).

(2d.) The first objection was to the question: "Now "state simply with reference to this paper how it "came to be presented?"

The defendant's counsel objected to the question

as irrelevant and incompetent. Question allowed; to which ruling counsel for defendant duly excepted (Record, p. 26).

But the question was perfectly relevant, and perfectly competent, and there was no error in the Court allowing the question.

The defendant had produced, and put in evidence a certain paper purporting to be an inquest by a Coroner's jury on the view of the body of Edward F. Hall, and the verdict of the jury on the inquest (Defendant's Exhibit C, July 6, 1888; Record, pp. 45–49). The defendant claimed that this was a part of the proofs of death. The witness, John Sherman Moulton, had obtained this paper for the defendant, and had handed it to the defendant's secretary (Record, p. 15).

The proofs of death, which were signed and sworn to by the plaintiff, November 24, 1886 (Record, p. 51), were delivered to the defendant, according to the testimony of Mr. Brownell, about a week or ten days prior to the 13th day of December, 1886, and this paper purporting to be a Coroner's inquest was received by him, he said, on December 13, 1886 (Record, pp. 16, 17). It was perfectly competent and relevant, therefore, for Mr. Moulton to state how this paper, purporting to be a Coroner's inquest, came to be presented. The question: "Now state "simply with reference to this paper how it came "to be presented?" was strictly admissible. The Court, therefore, properly overruled the objection. The question itself did not necessarily call for any incompetent testimony. If the answer were objectionable a motion should have been made to strike it out. The answer to a question, not in itself objectionable, on legal grounds, if contravening any rule of evidence, may be stricken out upon a motion to that effect; and such is the proper practice; and an objection to a question, based on the ground which such a motion would take, is not sufficient, where

the question itself is not suggestive of the objection (Denise *vs.* Denise, 110 N. Y., 562, 568). A question to a witness may be proper and pertinent, and therefore not subject to objection; but, if the answer is irresponsive or objectionable, the remedy of the party aggrieved by the evidence is to move that the irresponsive or objectionable part of the answer be stricken out, or to request the Judge to instruct the jury to disregard it, and in case of a denial of the motion or request, to except to the ruling.

Platner *vs.* Platner (78 N. Y., 90, 102).
Turner *vs.* City of Newburgh (109 N. Y., 301, 310).

There was no motion made to strike out the answer of Mr. Moulton to the question, and the counsel for the defendant did not request the jury to disregard it; and the attention of the Court was not called in any way to the fact that the answer was objectionable, if it was so. The question was competent for the purpose of explaining why the paper purporting to be the Coroner's inquest was not presented with the proofs of death, and how it came to be presented nearly ten days after the proofs of death had been presented; and, if competent for any purpose, the objection to it was not well taken.

Parsons *vs.* N. Y. C. & H. R. R. R. Co. (113 N. Y., 365.)

Mr. Moulton answered the question: "I went to "the company and presented the proofs of loss. "They then asked me if there was a Coroner's ver- "dict." This answer was not objected to, and no motion was made to strike it out.

Mr. Bright then asked the witness: "What oc- "curred between you and Mr. Brownell respecting "the Coroner's verdict? State the occurrence and "the conversation?"

A. "After I presented the first proofs of loss, they

" asked me if there was any Coroner's verdict. I " told them at that time that I did not know."

Then the following occurred:

By the Court:

" Was this said to Mr. Brownell?"

A. " As to that I am not quite clear."

By Mr. Bright:

" Was it at the company's office?"

A. " It was at the company's office, and it was " either to Mr. Brownell or the agent who com- " municated with Brownell, and then came back to " me and told me that he said."

Objected to by counsel for defendant unless confined to Mr. Brownell.

(Answer continued.) " Some one came from Mr. Mr. Brownell, because the agent told me so."

Objection overruled, to which ruling the defendant's counsel duly excepted (Record, p. 26).

The objection and exception, which are the basis of the first assignment of error, came too late. The evidence was then already before the jury without exception, and the defendant's remedy was to move to strike the evidence out. This he did not do. He did not raise the question properly, therefore, and his exception is not available on appeal, not having been made in time, and no motion having been made to strike out the evidence.

Parsons *vs.* N. Y. C. & H. R. R. R. Co. (113 N. Y., 365).

Hangen *vs.* Hackmeister (114 N. Y., 566, 570).

(3d.) If the objection in this first assignment of error is addressed to what Mr. Moulton had already testified to, previous to the objection by the defendant's counsel, that testimony had been received already

without objection and it cannot be assigned as error, that the Court received evidence which was not objected to at the time, no motion having been made to strike it out.

A party who has permitted the reception of improper evidence, without properly objecting thereto, may not thereafter object to the same, and has not a legal right to have the same stricken out.

In re Morgan (104 N. Y., 74).
Hangen *vs.* Hackmeister (114 N. Y., 566, 570).

All the conversation which Mr. Moulton testified to with any person in the office of the defendant below, whether Mr. Brownell, or any person other than Mr. Brownell, was already testified to by him before this objection of the counsel for the defendant was made.

After that objection was made, Mr Moulton testified simply to what he did; that he went to the Coroner's office and asked for the Coroner's verdict, &c.

There was no error, therefore, in the Court receiving the testimony of Mr. Moulton, as to the conversation, which was not objected to; and, after the objection was made, although the Court overruled the objection, the ruling did no harm, because Mr. Moulton did not after that testify to any conversation (Record, p. 26).

The part of his answer, "as the company had asked me for the Coroner's verdict," was not testifying to a conversation, and was not objectionable. It was only giving the reason for his action, which he had testified to previously, without objection, in his answers to the questions by the Court and by Mr. Bright, viz., that they (the company) asked him if there was a Coroner's verdict.

Even if the testimony was improper, which it was not, the repetition under objection of improper evi-

dence already in the case is not an error authorizing a reversal.

White *vs.* O. D. S. S. C., (102 N. Y., 660).

(4th.) Furthermore, the reception of this evidence could have done the defendant no injury. It could not increase the defendant's liability, nor in any way impair its defense, that Mr. Moulton should testify that some one in the company's office asked him for the Coroner's verdict.

Mr. Brownell, a witness for the defendant, and an officer of the company, testified, in substance, that he asked Mr. Moulton for the Conorer's verdict. He said: "Mr. Moulton came into my private room in "the office, one day, and handed me a paper and said "that there were the proofs of death. I looked at "them, and said that they were incomplete, under "the circumstances of the shooting, and that the "Coroner's verdict did not accompany them as di-"rected" (Record, p. 33).

What Mr. Moulton testified to, therefore, could not be said to harm the defendant, when the defendant proved the same fact by its own witness.

An error in reception of evidence which could have done no injury will not justify a reversal.

Frear *vs.* Sweet, (118 N. Y., 454, 460).

A judgment will not be reversed for error in the admission of such testimony, unless the Court is satisfied upon an examination of the whole case that the appellant is prejudiced thereby.

McGean *vs.* Manhattan Ry. Co., (117 N. Y., 219, 224).

Tenny *vs.* Berger, (93 N. Y., 524, 531).

People *vs.* Gonzales, (35 N. Y., 59).

V.

The second assignment of error is not well taken.

The Court below correctly received the evidence of the witness Charlotte E. Hall as to the views and plans for the future of her husband, Edward F. Hall, Jr. (Record, p. 31).

The Court, on allowing the question, instructed the witness that she was not to state hearsay. Consequently, he limited her to what she knew of her own knowledge. It was relevant on the question of suicide. It tended to show that Mr. Hall was making plans and preparations for the future, at the time of his death; that he was looking forward to his wife's return, and preparing and arranging rooms for her, which is incompatible with the idea of an intention to commit suicide.

The assignment of error incorrectly states, that the "evidence was to the effect that in the month "of July preceding his death her husband was pre-"paring rooms and arranging for her return to "him." The witness did not so testify. The question put to her, which elicited her testimony, did not mention the month of July, and her answer cannot be said to refer to that month. The time which she was speaking of was the time of Mr. Hall's death. She began her testimony: "The Mr. "Hall, whose death has been described to you, was "my husband. At the time of his death I was at "Newport. At that time I was very ill." This is the time, therefore, which she referred to when she said, "I know that he was preparing and arranging "rooms for me to be brought back; he was prepar-"ing for my return" (Record, p. 31). Her previous answer to Mr. Fox, that she had not seen Mr. Hall since July, had nothing to do with the time, when, as she testified, he was making these preparations

for her return. This was in the month of October, at the time when he died.

VI.

The third assignment of error is not well taken.

The Court below correctly overruled the objection of defendant's counsel to the question by counsel for the plaintiff to Mrs. Hall: "Do you know what degree of interest he felt in his son's prosperity, and in his career in college?" (Record, p. 31.)

The evidence was proper to show a want of motive in Mr. Hall to commit suicide; that he had a deep interest in his son's welfare. Even if this evidence was immaterial and irrelevant, still it was not of a character to seriously affect the defendant's case.

If the evidence, though incompetent, is slight or irrelevant, or if, without it, the fact is sufficiently established by other evidence, the error in receiving it may be disregarded on appeal, because it could not have injured the other party.

Foote *vs.* Beecher, 78 N. Y., 155.
Hensler *vs.* Sefrin, 19 Hun, 564, 668.
Woodruff *vs.* McGrath, 32 N. Y., 255.
Ward *vs.* Kilpatrick, 85 N. Y., 413, 417.
Tenny *vs.* Berger, 93 N. Y., 524, 531.

Section 1003 of the New York Code of Civil Procedure provides that "an error in the admission or "exclusion of evidence, or in any other ruling or "direction of the Judge upon the trial, may, in the "discretion of the Judge which reviews it be dis-"regarded."

VII.

The fourth assignment of error is not well taken.

The Court correctly admitted the evidence of Henrietta P. Sargent in answer to the question: "At these times, when so suffering from the severe "headache, what was his manner in respect to "genial conduct or hopeful exhibition of tempera- "ment?" Answer: "He was always cheerful and "bore them very bravely" (Record, p. 33).

The defendant had endeavored to show from the letter found on Mr. Hall's table, which the defendant put in evidence, in which he complained of suffering in his head, and from the testimony of other witnesses, whom the defendant's counsel had questioned as to Mr. Hall having severe headaches, that these headaches produced melancholia in Mr. Hall, which might account for his alleged suicide. It was therefore perfectly relevant and competent for Mrs. Sargent, who was his sister, and who knew what his general temperament and conduct had been, when attacked by these headaches, to testify how he bore them, that the jury might know what importance to give to the testimony as to these headaches, and judge whether they were likely to produce melancholia in Mr. Hall sufficient to lead to aberration of mind.

Whether the suicide of a person, hypothetically regarded as subject to melancholia, might be attributed to the disease, is not a question for an expert, but for the jury.

Van Zandt *vs.* Mut. Benefit Life Ins. Co. (55 N. Y., 169).

The testimony of persons not experts as to the conduct, manner and appearance of the subject,

and the impressions made on them, is competent to go to the jury on the question of insanity.

Insurance Co. *vs.* Rodel (95 U. S., 232, 240).

The testimony of Mrs. Sargent was relevant, therefore, and competent to show that Mr. Hall exhibited no signs of melancholia when afflicted with these headaches, but was always cheerful and bore them bravely, as a fact to go to the jury, from which they could draw their inference as to whether the death of Mr. Hall was to be attributed to that cause.

VIII.

The 5th assignment of error is that the Court below erroneously received the evidence of the witness Andrew S. Brownell, referred to in said assignment of error (Record, p. 62).

The evidence referred to is on page 34 of the Record.

The question was asked on cross-examination, and had a bearing upon the subject of his acceptance of the proofs of death, and was material and relevant upon the point whether "satisfactory evidence" of death had been furnished, as well as upon the sufficiency of the proofs of death. Mr. Brownell was an officer of the defendant. He had testified that he received the proofs of death (Record, p. 16).

He was asked by the counsel for the defendant whether he had any conversation with Mr. John Sherman Moulton, and he said he had a slight conversation with him upon the subject of the proofs of death that were brought in by Mr. Moulton to him. He was then asked by defendant's counsel to give

the substance of the conversation, and he went on to give the conversation.

The counsel for the plaintiff then cross-examined him as to what was said in this conversation to ascertain if he did not express himself as satisfied with the proofs of death, and the question objected to was a part of this cross-examination (Record, pp. 33, 34). Mr. Brownell had undertaken to contradict Mr. Moulton's version of the conversation, when the proofs of loss were served; and this question was pertinent in cross-examination as affecting the accuracy of Mr. Brownell in his contradiction.

The counsel for the defendant was the first to inquire of the witness as to the conversation which he had with Mr. Moulton. He asked the witness to give the substance of the conversation. After he had thus opened the door, and introduced a part of the conversation, he could not close it, as against cross-examination, relative to this same conversation. The defendant having obtained from the witness part of the conversation, the plaintiff clearly had a right to obtain from the witness the remainder of the conversation. In Miller *vs.* Montgomery (78 N. Y., 286), the Court said: "But a party may waive his objec-" tions to the incompetent evidence in several ways. " He may do it by himself inquiring as to the for-" bidden transactions or conversations."

Furthermore, a greater latitude is allowed to the examiner upon cross examination than would be allowed upon a direct examination. The extent to which such an examination shall be carried is largely in the discretion of the Court, and its exercise is not subject to review except in a clear case of abuse. Whether a party shall be allowed upon the cross-examination of a witness to go beyond the scope of a legitimate cross-examination, and interrogate him as to matters not brought out upon the examination in-chief rests wholly in the discretion of the trial

Judge, and his ruling upon the question is not open to review.

Neil *vs.* Thorn, 88 N. Y., 270.
Lefler *vs.* Field, 52 N. Y., 620.

IX.

The sixth and seventh assignments of error (Record, pp. 62, 63), both refer to the excluding by the Court of the questions put to Andrew S. Brownell, a director of the defendant relative to a conversation which he testified he had with Charles W. Moulton, the agent of the plaintiff, in November, 1886, when he called at the office of the defendant to present the claim of the plaintiff for the payment of the $5,000 on the policy (Record, pp. 17 and 33).

(*a.*) The assignments of error sixth and seventh improperly state according to the testimony in the case that Mr. Brownell was secretary of the defendant below.

Eugene A. Baker testified on the trial in February, 1888, that he was secretary of the defendant, and had been for two years (Record, p. 15). That would carry the period in which he was secretary back to February, 1886. The conversation with Mr. Moulton, Mr. Brownell said, was in November, 1886. Mr. Brownell testified that he was secretary in 1885 (Record, p. 16). The proofs of death were not presented to him, but to Mr. Baker (Record, p. 15).

(*b.*) The question was properly excluded. It is immaterial what may have been the nature of the conversation; he may have made statements favorable or unfavorable to the plaintiff, and they would

not have been relevant, unless it was shown that the statements were made by Mr. Moulton, as agent of the plaintiff, in the performance of the duty then in hand, to wit, the presentation of her claim against the company for the $5,000 payable to her on the policy.

He may have even expressed an opinion that Mr. Hall's death was caused by suicide, but it would only have been hearsay, and merely the expression of an opinion. He could not bind the plaintiff by any such declaration, nor could he alter in any way the fact that the company was liable to the plaintiff under the policy. Her rights had become fixed under the policy by the death of Mr. Hall, and as the rights of the parties had become fixed, the testimony offered was rightly excluded.

Justh *v.* Bank of Commonwealth, 36 N. Y. Super. Ct., 273, 279; aff'd 56 N. Y., 478.

Baptist Church *v.* Brooklyn Fire Ins. Co., 28 N. Y., 153.

The duty of the plaintiff was to furnish proofs of death, and these she furnished in December, 1886, subsequently to the time of the alleged conversation with Mr. Moulton. This alleged conversation with Mr. Moulton was not in connection with the presentation of the proofs of loss, because Mr. Charles W. Moulton did not present the proofs of loss. They were handed to the company by Mr. John Sherman Moulton, nearly two months after this conversation is said to have occurred.

Mr. Moulton had no authority to act or speak for Mrs. Sargent except in respect to the matter in hand. He had no incidental authority to make any declarations binding upon her not within the scope of the business in which he was employed.

First Nat. Bk. *v.* Ocean Nat. Bk., 60 N. Y., 278, 297.

The declarations of an agent to be admissible must be in the nature of original and not of hearsay evidence. They must constitute the fact to be proved, and must not be the mere admission of some other fact. They must be made, not only during the continuance, but in regard to the transaction depending at the very time.

1 Greenleaf Ev., § 13.
Story on Agency, §§ 135–136.
Luby *vs.* The Hudson R. R. Co., 17 N. Y., 131–133.
Anderson *vs.* Rome, W. & O. R. R. Co., 54 N. Y., 334–341.
Ford *vs.* L. S. & M. S. R. R. Co., 124 N. Y., 493.

If the declaration of Mr. Moulton was to be used to prove the fact in issue, which was the question whether Mr. Hall committed suicide, it was not admissible, because it was made after the transaction, and also because it was hearsay evidence, as he knew nothing as to the cause of Mr. Hall's death of his own knowledge.

(*c.*) The counsel for the plaintiff did not disclose what he expected to prove by the questions, and it is impossible to discover what competent evidence could have been elicited by them. No evidence which could have been elicited in answer to the questions could so bind the plaintiff as to release the defendant from the liability under the policy. The Court, therefore, committed no error in excluding the questions.

Nightingale *vs.* Eiseman, 121 N. Y., 288–293.

(*d.*) The declaration of Mr. Moulton, which it was proposed to prove by the questions to Mr. Brownell,

was the declaration of a person, who was then deceased, and, therefore, it was properly excluded.

What a deceased person has been heard to say, except upon oath, or *in extremis*, when he comes to a violent end, never has been considered as competent evidence.

Gray *vs.* Gooderich, 7 John.'s Rep., 94–95.

Wilson *vs.* Boerem, 15 John.'s Rep., 286–287.

Capron *vs.* Austin, 7 John.'s Rep., 96.

X.

The 8th assignment of error is not well taken. The request to direct a verdict for the defendant mentioned in said assignment was made when the plaintiff rested (Record, p. 15). The Court properly refused to direct a verdict on the ground mentioned in the request.

(1st.) The policy did not contain any provision making the production of the proofs of death a condition of the payment by the defendant of the amount of the insurance. The sum named in the certificate was payable, according to the terms of the certificate or policy, "within ninety days "from the receipt of satisfactory evidence to the "association of death of the said member during "the continuance of this certificate in force" (Record, p. 7).

Nothing is said in this clause about proofs of death. All that is required is satisfactory evidence of the death of the member.

The policy also contained a clause or condition which reads as follows:

"8. Proofs of death must be furnished to the asso-
" ciation within one year after death, and must con-
" tain full answers under oath to the questions in
" the association blank furnished for that purpose.
" The omission of any of the answers or statements
" required must be satisfactorily explained and sup-
" plied by other proofs" (Record, p. 8).

But this clause does not say that payment shall be conditioned upon presentation of said proofs, and it does not by any reference to the previous clause qualify or modify the agreement and stipulation contained in that clause of the policy that the $5,000 shall be payable "within ninety days after " receipt of satisfactory evidence to the association "of death of the said member." It was not necessary for the plaintiff to aver or prove that she furnished to the defendant satisfactory proofs of the death of said Edward F. Hall, Jr. All that was essential to make out a cause of action was a statement of the contract, the death of the assured, and the failure to pay as provided. Murray *vs.* New York Life Ins. Co. (85 N. Y., p. 239).

Although the complaint alleged that the plaintiff furnished to the said association satistactory proofs of the death of said Edward F. Hall, Jr., yet, as the allegation was not properly in the complaint for the purpose of making out a good cause of action, the complaint must be regarded as if it contained no such agreement (*Id.*).

The only facts which were really to be tried were those averred in the affirmative defense set up in the answer, that the death of Mr. Hall was brought about by his own hand, and that he died from the immediate effect of a shot from a pistol fired by his

own hand, with the intention of taking his own life.

(2d.) There was sufficient evidence to justify the Court in refusing to nonsuit. The answer of the defendant admitted the death of Mr. Hall (Record, p. 10). It also admitted, by not denying, the allegation of the complaint that, immediately after the death of Mr. Hall, "the plaintiff notified the defend-"ant herein of the said death of the said Edward F. "Hall, Jr." (Record, p. 5).

By the New York Code of Civil Procedure every material allegation of the complaint, not controverted by the answer, must, for the purpose of the action, be taken as true (Code of Civil Pro., § 522.

The answer also admitted that proofs of the death of said Edward F. Hall, Jr., were delivered by the plaintiff to the defendant, and payment demanded (Record, p. 10).

The complaint contained the following allegation: "And that afterwards, on or about the 15th day of "December, 1886, she furnished to the defendant "herein the satisfactory proofs of the death of the "said Edward F. Hall, Jr., and delivered the same "to the officers of said association at their offices in "the City of New York" (Record, p. 5).

The answer of the defendant contained the following denial: "And defendant denies that the plaintiff "thereafter furnished to the said association satis-"factory proofs of the death of said Edward F. "Hall, Jr. (Record, p. 10).

The denial that the plaintiff furnished "*satisfactory* proofs of the death of said Edward F. Hall, Jr.," amounted to a *negative pregnant*, and was equivalent to an admission that proofs of death of said Edward F. Hall, Jr., were served, but a denial that they were satisfactory. This, together with the ad-

mission in the fifth paragraph of the answer, in which the defendant said "that more than ninety "days have elapsed since certain alleged proofs of "death were delivered by the plaintiff to the defend- "ant," constituted a clear admission that the plaintiff did deliver to the defendant proofs of death of Edward F. Hall, Jr.

But the request made by the counsel for the Court to direct a verdict for the defendant was: "Upon "the ground that the plaintiff has failed to show "that she has ever presented to the defendant satis- "factory evidence of the death of Edward F. Hall, "Jr., or has presented any evidence of his death" (Record, p. 15). The Court could not grant this request because the plaintiff had not failed to show even when this motion was made, that she had presented to the defendant some evidence of the death of Edward F. Hall, Jr.

The motion was not made upon the ground that the plaintiff had failed to show that she had furnished *satisfactory proofs* of the death of Edward F. Hall, Jr., but on the ground that she had failed to present "*satisfactory evidence*" or "*any evidence*" of his death.

The admissions in the answer of the defendant showed that some evidence had been presented by the plaintiff to the defendant of the death of said Edward F. Hall, Jr.

The complaint alleged "that immediately there- "after the plaintiff notified the defendant herein of "the said death of the said Edward F. Hall, Jr.," (Record, p. 5). The answer of the defendant did not deny this allegation. The Court was compelled, therefore, by the provisions of the New York Code of Civil Procedure (§ 522) to take it as admitted by the defendant that the plaintiff had notified the defendant of the death of said Edward F. Hall, Jr.

This showed that she had presented some evi-

dence to the defendant of the death of said Edward F. Hall, Jr.

By the form of its answer also, the defendant admitted that the plaintiff furnished the defendant proofs of death. The answer alleged: "That more "than ninety days have elapsed since certain alleged "proofs of death were delivered by the plaintiff to "the defendant" (Record, p. 10).

This showed that *some evidence* had been presented by the plaintiff to the defendant of the death of said Edward F. Hall, Jr., and it was impossible for the Court to say, as a conclusion of law, that the plaintiff had failed to show that she had ever presented to the defendant any evidence of his death.

In the case of the Buffalo Loan, Trust and Safe Dep. Com. (126 N. Y., 450, 453), by the terms of the certificate of membership, the defendant obligated itself to pay to the heirs or legal representatives of the assured the sum payable on the policy "within sixty days after the notice, and satisfactory "proof of the death (during the continuation of the "contract) of the said John Roberts." The Court, Andrews, *J.*, said: "There is no requirement that "the cause of death shall be communicated to the "association by a claimant, nor, under the policy "could this be exacted. The beneficiary of the "policy performed his entire obligation under the "contract when he gave the association due notice "of the death of the assured, and furnished proof "that the death has in fact occurred. The words "'satisfactory proof' entitled the association to "demand that the *fact of the death* should be shown "with reasonable definiteness and certainty, and if "the proofs furnished failed to satify the associa-"tion of the *fact of the death*, the association, act-"ing reasonably and in good faith, could require "further evidence. But the insurer cannot, under "guise that the requirement that 'satisfactory "proof' of the death of the assured should be given,

"demand information of the *cause of the death.*
"This would be a different subject. The informa-
"tion, however important it might be in its bearing
"upon a death from the excepted causes, neverthe-
"less has no relation to the one fact, which alone
"the claimant is bound to embrace in his proofs.
"(See Grattan *vs.* Metropolitan Life Ins. Co., 80
"N. Y., 281; Ins. Co. *vs.* Rodel, 95 U. S., 232.)"

(3d.) As to that part of the request to the Court to direct a verdict for the defendant upon the ground that the plaintiff has failed to show that she ever presented to the defendant satisfactory evidence of the death of Edward F. Hall, the answer did not set up as a defense that the proofs of loss were in any respect insufficient. All that the policy required of the plaintiff, as to furnishing proofs of death, was that she should furnish proofs within one year after death. The answer admitted that she did that. If the proofs were unsatisfactory the defendant should have returned them; and if the defendant intended to rely on that as a defense, it should have alleged that the proofs were defective, and should have stated in what respect they were insufficient. The defense made to the payment of the policy was that Mr. Hall had committed suicide. The defendant had accepted the proofs of death and retained them, and the defendant took the ground that it was not bound to pay the loss, because, as it alleged, Mr. Hall had committed suicide. The defendant must therefore be held to have waived any objection to the sufficiency of the proofs of death.

Ames *vs.* N. Y. U. Ins. Co. (14 N. Y., 253.)

The weight of authority is in favor of the rule that a distinct denial of liability and refusal to pay on the ground that there is no contract, or that

there is no liability, is a waiver of the condition requiring proof of the loss or death.

Life Ins. Co. *vs.* Pendleton, 112 U. S., 709.

Tayler *vs.* Merchants' Fire Ins. Co., 9 How. U. S., 390, 403.

Brink *vs.* Hanover F. Ins. Co., 80 N. Y., 108.

Lozensky *vs.* Supreme Lodge Knights of Honor, 31 Fed. Rep., 592.

The preliminary proof of loss or death required by a policy is intended for the security of the insurers in paying the amount insured. If they refuse to pay at all, and base their refusal upon some distinct ground, without reference to the want or defect of the preliminary proof, the occasion for it ceases, and it will be deemed to be waived.

Life Ins. Co. *vs.* Pendleton (112 U. S., p. 710).

(4th.) The subsequent evidence showed that proofs of death were delivered to the defendant. The defendant produced and put in evidence the proofs of death, and Mr. Baker, the secretary of the defendant, testified that he received them (Record, p. 15). Even if the proofs, therefore, were improperly omitted from the plaintiff's case, the defect was cured by their subsequent introduction; and the Court will not disturb a verdict on the ground of insufficiency of proofs when a motion to nonsuit was made, if the deficiency is afterwards supplied.

Squire *vs.* Central Park, N. & E. R. R., 36 N. Y. Super. Ct. Rep., 436, 447.

Schenectady & Saratoga Plank Road Co. *vs.* Thatcher, 11 N. Y., 102.

Where a motion for nonsuit is denied at the close of plaintiff's case, though there is not suffi-

cient evidence to sustain the complaint, and defendant does not rely on the denial of the motion, but goes on with his proofs, the whole evidence in the case will be considered on appeal to determine whether there is enough to sustain the verdict.

Leslie *vs.* Knickerbocker Ins. Co. (63 N. Y., 27.)

XI.

The 9th assignment of error is not well taken. The Court properly refused to direct a verdict, as asked for by the counsel for the defendant, upon the ground that the evidence showed that Edward F. Hall died by his own hand.

This motion was made by the counsel for the defendant at the close of the whole case (Record p. 35).

It was a question of fact for the jury to determine from the whole evidence in the case whether Hall died by his own hand.

In a case triable by a jury, the direction of a verdict is only justified when the evidence conclusively establishes the right of the party in whose favor it is made.

Bulger *vs.* Rosa (119 N. Y., 459).

It certainly could not be said in the present case that the evidence conclusively established the fact of suicide.

If in any view of the evidence, taken in its most favorable light, a verdict may be rendered for the plaintiff, or, if there are questions of fact, which may be determined for the plaintiff, and, if determined in his favor, will entitle him to recover, the

case should not be taken from the jury by a non-suit.

Clemence *vs.* City of Auburn, 66 N. Y., 334, 338.
Carl *vs.* Ayres, 53 N. Y., 14.
Colt *vs.* Sixth Ave. R. R. Co., 49 N. Y., 671.
Heyne *vs.* Blair, 62 N. Y., 19.
Manhattan Life Ins. Co. *vs.* Broughton (109 U. S., 127).
Conn. Mut. Life Ins. Co. *vs.* Lathrop (111 U. S., 615).

In Phenix Ins. Co. *vs.* Doster (106 U. S., 30, 32), the Court said that "Where a cause fairly depends "upon the effect or weight of testimony, it is one "for the consideration and determination of the "jury under proper directions as to the principles "of law involved. It should never be withdrawn "from them unless the testimony be of such a con-"clusive character as to compel the Court in the "exercise of a sound legal discretion to set aside a "verdict returned in opposition to it."

XII.

The portion of the Judge's charge referred to in the tenth assignment of error (Record, p. 63) was perfectly proper.

The answer of the defendant herein contained the following denial: "But defendant denies that said "Edward F. Hall, Jr., performed all the conditions "mentioned in said certificate or policy which were "therein stipulated he should perform" (Record, p. 10). The answer contained also the following

allegation: "But defendant alleges that the death of "said Edward F. Hall, Jr., was caused by one of the "causes excepted from the operation of this certifi- "cate or policy," &c. (Record, p. 10). The Judge, therefore, correctly stated in his charge that "The "defendant comes into Court and asserts that the "contract under which the action is brought has "not been fulfilled, but has been violated by the "assured" (Record, p. 36).

The Judge also correctly charged the jury as follows: "Being an affirmative defense, the *onus* is "upon the defendant to satisfy you by evidence "which in your judgment outweighs the evidence "of the plaintiff that that defense has been estab- "lished" (Record, p. 36).

In Murray *vs* New York Life Ins. Co. (85 N. Y., 240), the Court said: "The rule is well established "that in an action upon a policy of insurance, when "the answer admits the issuing of the policy, and "the allegations in the complaint, and alleges a "breach of its conditions, the burden of proof is "upon the defendant, and the plaintiff is entitled "to recover, unless the defendant satisfies the Court "or jury by a preponderance of evidence that the "conditions had been broken (Jones *vs.* Brooklyn "Life Ins. Co., 61 N. Y., 79; Van Volkenburg *vs.* "Am. Pop. Life Ins. Co., 70, *Id.*, 605; Elwell *vs.* "Chamberlin, 31, *Id.*, 611)." The defendant had the affirmative of the issue, and the rule which the Judge stated in his charge is the same as is laid down by all the authorities where the defendant has the affirmative of the issue.

Stearns *vs.* Field, 90 N. Y., 642.
Starkie on Ev., 9th Am. Ed., p. 534.
1 Phillips' Ev., 552.

It is incumbent upon the party holding the affirmative of the issue in a civil action to satisfy the jury by a preponderance of evidence of the facts upon

which his case depends; if he fails to do this the opposite party is entitled to a verdict.

Cranston *vs.* N. Y. C. & H. R., 103 N. Y., 614.

Where a material averment of the complaint is admitted by the answer, and sought to be avoided by new matter, the burden of proof is upon the defendant.

Connor *vs.* Keese, 106 N. Y., 643.

Where, in an action upon a policy of marine insurance, the defense was that the vessel insured was lost through the agency or instrumentality of the assured, Held, that the burden of proof upon the issue rested upon defendant.

Sclocovich *vs.* Orient. Mut. Ins. Co., 108 N. Y., 56.

In Blunt *vs.* Barrett, 124 N. Y., 117, the complaint alleged that defendant wrongfully removed plaintiff's yacht from a certain place in the East River to another place where she was exposed to danger, and in consequence she sunk. Defendant's answer admitted plaintiff's title, the taking and sinking of the yacht, but denied that the taking was wrongful and alleged it was his duty as custodian of the yacht to remove her to a safe place, and that he removed her where he had no reason to apprehend danger. The Court charged that the burden of proof was upon plaintiff, and that he must establish by a preponderance of evidence that the vessel was removed without authority. The Court of Appeals held this was error; that under the pleadings the burden was upon defendant to show some right to remove the yacht by way of justification. Bradley, *J.*, said: "It must "be assumed under our system of pleadings that "the plaintiff took issue upon those allegations "justifying the taking, and therefore the affirmative

" of such issue was with the defendant. The burden " was with the defendant to establish this affirma- " tive of justification of the taking, so alleged by " him, and it was error for the Court to charge the " jury that the burden to prove the contrary was " with the plaintiff."

The burden of proof so resting upon the defendant to prove the defense of suicide alleged in its answer was not shifted to the plaintiff, but remained with the defendant.

In Blunt *vs.* Barrett (*supra*), Bradley, *J.*, said: " And the burden of proof by the issue so made " having been taken by the defendant was not " shifted to the plaintiff at the trial. As a rule it " remains where the issue made by the pleadings " places it, although the weight of the evidence on " one side may have a controlling effect, unless met " by proof of the other party."

Also to the same effect:

Heilman *vs.* Lazarus, 90 N. Y., 672.
Heineman *vs.* Heard, 62 N. Y., 448.

XIII.

The portion of the Judge's charge referred to in the 11th assignment of error was more favorable to the defendant than the evidence from the proofs themselves warranted.

The Court stated that the proofs of death asserted generally " that Edward F. Hall met his death by " suicide while laboring under temporary aberration " of the mind " (Record, p. 37).

The proofs did not contain any such assertion (Record, pp. 49–57).

The remaining portion of the charge, objected to by the assignment of error, presents no error.

The defendant had introduced in evidence the proofs of death furnished by the plaintiff to the defendant (Record, pp. 15–16, and Defendant's Ex. D; Record, pp. 49–57).

The Court charged the jury as follows: "I do not "think it is necessary to say further upon that "point, gentlemen, than that these proofs are "properly in the case. They are proper evidence "for you to consider. They are by no means con- "clusive evidence, but they are evidence which "should be taken by the jury in connection with "the other testimony in the case, and given such "weight in determining the main question as the "jury may see fit to give them" (Record, p. 37).

(1st.) The Court by this charge laid the proofs before the jury as evidence for them to consider, and give such weight to, as the proofs seemed to them to deserve. This was all that the Judge could do. It was not his duty to determine the weight of the evidence. Whether evidence is admissible is for the Court, whether it is sufficient is for the jury.

Starkie on Ev., 9th Am. Ed., p. 788.
Greenleaf on Ev., Vol. I., p. 185.
Bk. of the Metropolis *vs.* Guttschleck (14 Peters, 19).

The proofs of death were not conclusive evidence of the cause of Mr. Hall's death, so that the Judge was bound to tell the jury, as a conclusion of law, that they established the fact of suicide beyond contradiction.

Giving the proofs the fullest effects, they were mere hearsay declarations respecting the cause of the death of Mr. Hall. The plaintiff, Mrs. Sargent, who verified the proofs, distinctly stated in the proofs, in answer to the question: "Give every par- "ticular relating to the cause and circumstances of "the sickness and death of deceased?" that she "was

" in West Medford at time of death of deceased and " could give hearsay only " (Record, p. 50). The proofs themselves therefore showed that she did not speak from any personal knowledge whatever. Yet the jury were permitted by the Court to deal with the proofs as if they were original evidence relating to a substantial fact

When the Judge said that they were evidence " which should be taken by the jury in connection " with the other testimony in the case," he was only charging the jury as the circumstances of the case required. The proofs of death were not the only evidence before the jury, nor had the defendant relied upon them as the only evidence in relation to the circumstances of Mr. Hall's death, or as establishing a *prima facie* case in its favor. It had called other witnesses to prove the cause of death; and these witnesses, called by the defendant, testified to facts both on their direct and cross-examination which it was for the jury to consider in connection with the proofs of death, and to weigh with the proofs.

In view of this testimony, it was impossible for the Court, in its instructions to the jury, to assign particular force and effect to the proofs of death as if they were the only evidence for the jury to consider. The Court, therefore, committed them to the jury as competent and material evidence, and instructed the jury to weigh them, together with the other testimony in the case.

If it is suggested that the defendant could claim advantage of the rule which applies when the means of knowledge are peculiarly within the reach of the opposite party, and that it was only necessary for it to make out an apparent case and then shift the burden of proof upon the plaintiff, the Court of Appeals of this State have held that this rule does not apply where it does not appear that the means of

knowledge were peculiarly within the reach of the plaintiff.

Jones *vs.* Brooklyn Life Ins. Co., 61 N. Y., 79, 86.

The plaintiff resided in West Medford, Massachusetts, and Mr. Hall, the insured, resided in New York. The policy was made payable to her only as being the creditor of Mr. Hall. There was no reason why she, living in a different city from Mr. Hall, and not having seen him for six months before his death, should have the means of knowing the cause of his death, peculiarly within her reach, any more than the defendant. It was evident that she had no peculiar means of knowledge; and that all the knowledge which she could acquire could be obtained by the defendant as well as by the plaintiff.

The plaintiff was not with Mr. Hall when he died. She did not see, and no one, as far as could be ascertained, saw how the accident, or the act which occasioned the death, occurred. The evidence of the witnesses in the house and of the physicians, and the inquest of the Coroner, if there was one, were as much within the reach of the defendant, who had its office in New York City, as of the plaintiff. The rule therefore can have no application in the present case.

(2.) The proofs could not bind the plaintiff as an estoppel.

It in no way appeared that the defendant had been prejudiced by, or acted, or refrained from acting in any way in reliance upon the statements contained in the proofs. In its answer it set up suicide as an affirmative defense; but it did not claim in the answer that the plaintiff was committed to that conclusion by having furnished the proofs of death, and did not make that any part of its defense. It did not set up in the answer, nor allude to the

declarations in, or the nature and effect of, the proofs of death, nor allege in any way that the defendant had relied upon said proofs of death, or had been misled by them; nor was there any evidence offered by the defendant upon the trial to show that the defendant had been led by the statements in the proofs of death into adopting or abandoning any line of action of defense.

To constitute an equitable estoppel there must have been some act or admission by the party sought to be estopped, inconsistent with a claim which he now makes, and done or made with the intention of influencing the conduct of another, which he had reason to believe would, and which *did, in fact, have that effect* (N. Y. Rubber Co. *vs.* Rothsay, 107 N. Y., 310).

The act or representation must have been the inducement to the conduct of the other party.

Van Dusen *vs.* Sweet, 51 N. Y., 378.
People *vs.* Bk. of North Am., 75 N. Y., 547.

It cannot be said in this case that, even if the claimant made any admission in her proofs of death, inconsistent with the claim which she now makes, with the intention of inducing the defendant to pay the loss, and it is denied that she did; yet, even if she did do so, it cannot be said that it had that effect, and that the defendant was led thereby to pay the loss, or to refrain from defending against the claim. To constitute an estoppel the other party must have acted upon the strength of such admission or conduct (N. Y. Rubber Co. *vs.* Rothsay, (*supra*); Winegar *vs.* Fowler, 82 N. Y., 315, 318).

The plaintiff, therefore, was at liberty to show upon the trial what the truth was as to the cause of Mr. Hall's death, notwithstanding anything that might have been stated in the proofs of death.

In Winegar *vs.* Fowler, (*supra*,) the Court said:

"What plaintiff said furnished pertinent and ma-
"terial evidence upon the question of his title to
"the furniture, but did not estop him from showing
"and claiming the truth."

In Parmelee *vs.* Hoffman F. Ins. Co, (54 N. Y., 193, 197) it was claimed that a statement in the proofs of loss afforded conclusive evidence against the plaintiff of a breach of warranty as to occupation of the premises. Reynolds, *J.*, said: "It is too clear for
"argument that there was no estoppel, and I do not
"think the statements in the proofs of loss bear
"any such construction as is contended for by the
"defendant. But, however that may be, it was at
"most a question for the jury."

In Brown *vs.* Bowen (30 N. Y., 541), Mullin, *J.*, said: "In the absence of proof of the effect of the
"admission on the party setting up the estoppel, it
"is for the jury to say whether on the facts, the
"several essential parts of the estoppel are proved."

The Court in the present case was not asked to submit the question of estoppel to the jury; but was asked by the counsel for the defendant to instruct the jury that the statements in the proofs of death were conclusive upon the plaintiff, and that the plaintiff was bound by them.

The Court could not, in absence of evidence that the defendant relied upon the statements in the proofs of death, and was misled by them, and acted upon them, charge the jury as a conclusion of law that the plaintiff was estopped by the proofs, or that the statements in them were conclusive upon the plaintiff.

The proofs of death formed no part of the contract of insurance. The policy does not prescribe what the proofs shall consist of. It does say that proofs of death must be furnished to the association within one year after death, and shall contain full answers under oath to the questions in the association blank furnished for that purpose; but nothing

in the policy, nothing in the clause relating to the proofs, provides that the information given shall irrevocably bind the claimant.

In McMaster *vs.* Pres., &c., Ins. Co. of North America (55 N. Y., 222, 228), Folger, *J.*, said: "The proofs "of loss are not part of the contract of insurance, nor "a part of any contract. The contract of insurance "requires that they shall be rendered, but it does "not make them when rendered a part of itself, as "sometimes an application for insurance is made. "They are the act or declaration of one of the parties "to a pre existing contract, in attempted compliance "with its conditions. The other party to the con- "tract is not a party to this act or declaration, takes "no part in making it, does not assert that it is a "true statement, and is not bound thereby."

In the case last cited the policies contained a clause that "if the assured shall have or hereafter "make any other insurance on the property herein "insured, or any part thereof, without notice to and "consent of the company in writing, * * * the "policy shall be null and void;" also a clause requiring all persons having claims under the policy to give immediate notice thereof, and render an account with affidavit, stating, among other things, "other insurance, if any, and a copy of all policies;" and providing that, until such proofs were rendered, the loss was not payable.

Proofs of loss, verified by the person to whom the policies were issued, were furnished to the defendant, and they stated there was other insurance.

Upon the trial the plaintiff offered to prove that the statement in the proofs of loss was not true. This was objected to by the defendant upon the ground that the plaintiff was estopped by the statement in the proofs of loss, and could not contradict it. The objection was overruled and an exception was taken. Lake, the person to whom the policies were issued, and who verified the proofs, testified

that the insurance was not on the same property. Defendant moved for a nonsuit, upon the ground that it appeared that there was other insurance of which there was no proof defendant had notice, which motion was denied, and defendant excepted.

Folger, *J.*, said: "The other branch of the objection " is that the assured, having made his verified proofs " of loss, with this statement in it, had led them " into a particular defense, and is estopped to " deny it. The fact that there is a verification " does not of itself conclude the assured. " It has been repeatedly held to the contrary (Smith " *vs.* Ferris, 1 Daly, 18, 20, and cases there cited). " If by this objection is meant that the plaintiff is " estopped to show the existence of a contract of in- " surance, and the circumstances which have created " a liability to him on the part of the defendants, " and that this rests upon the established doctrine " of an *estoppel in pais*, we cannot so hold." * * * " All the elements of an *estoppel in pais* are lacking. " It arises from an act or declaration of a person in- " tended or calculated to mislead another, on which " that other has relied, and has so acted or refrained " from action as that injury will befall him, if the " truth of the act or declaration be denied. Now the " declaration of the assured in the proofs of loss was " not intended or calculated to mislead the defend- " ants into any change of their situation by which " they assumed a liability to him or assented to the " existence of one. Its natural effect, if it is to be " interpreted as the defendants claim that it should " be, is to prevent an assent to the existence of a " liability, and it had no effect, if thus interpreted, " to create one. Nor did the defendants rely upon " this declaration, and thereby change their situation " so as to contract or incur a liability. Before it " was made, they had done that from which their " liability took its rise. Nor does the exhibition of " the truth, though at enmity with the declaration,

"create or increase or change the liability." * * *
"It does not appear that, relying upon the defense
"supposed to be furnished by the proofs of loss, any
"other tenable defense had the go-by."

In Keeler *vs.* Reserve Fund Ass'n (29 Fed. Rep., 198), Simonton, *J.*, said: "The proofs of death give
"notice to the company that the life insured has
"terminated and that a claim is made. They put
"the insurer upon investigation. In such investiga-
"tion he may be directed, but surely not controlled
"by the proofs. He can question them, contradict
"them, disprove them. Were we to hold that a
"claimant under a policy is irrevocably bound by
"statements of facts in the proof; that there is no
"room for the correction of mistakes, corrections
"made upon after-discovered testimony and more
"careful inquiry, we would give to such proofs a
"character higher than is given to evidence on a
"trial and verdict thereon."

(3d.) The proofs of death contained no assertion that Mr. Hall died by his own hand. Consequently there was no statement in the proofs of death on which the defendant could rely, or by which it could be misled into setting up the defense of suicide.

The plaintiff stated in the proofs of death that she was in West Medford at the time of the death of deceased and could give hearsay testimony only. In answer to the question in the proofs, "Was the
"death of deceased caused by his own hand or acts,
"or in consequence of a duel or in violation of any
"law?" she replied: "See statement of Coroner's
"physician, Dr. Jenkins" (Record, p. 50).

The Coroner's physician here referred to was Dr. William T. Jenkins, whose affidavit accompanied the proofs (Record, pp. 51–53). The statement signed by him contained the following questions and answers:

Q. "State the remote cause of death?" To which he answered: "I do not know."

Q. "State the immediate cause of death?"

A. "Shock from penetrating pistol shot; wound "of head (right temple); mental aberration superin- "duced by chronic headache."

Q. "If from any cause other than disease, state "the medical and other facts connected therewith?"

A. "No."

Q. "Was a post-mortem examination made; by "whom and with what result?"

A. "No."

Q. "Was the death of deceased caused by his own "hand or acts?"

A. "I examined the deceased only as Coroner's "physician, and therefore am unable to make any "further statement than above, other than from the "history. His mental condition was probably due "to chronic headaches, which was caused either by "chronic meningitis or tumor of brain" (Record, p. 52).

There is, therefore, in the foregoing answers no assertion of suicide. On the contrary, Dr. Jenkins abstains from making any such statement. When asked, "Was the death of deceased caused or ac- "celerated or aggravated by his own hand or acts?" he meets the question by the declaration in substance that he had no knowledge, and was unable to make any statement except from what he had heard from others, which, of course, would be of no value as testimony. What Dr. Jenkins said about "mental "aberration superinduced by chronic headache," and that Mr. Hall's condition was "probably due to "chronic headaches, which was caused either by "chronic meningitis or tumor of brain," was all derived from hearsay and of no value. When asked to "state the remote cause of death," he said, "I do not know," and when asked the question, "If from any cause other than disease, state "the medical and other facts connected therewith?" He answered, "No." It appears by this answer that

he had no other facts to communicate, and the answers show that he had no personal knowledge of any of the facts relating to Mr. Hall's death. He said in his testimony upon the trial: "When I "speak of aberration and cephalgia, I speak wholly "and only of what others told me." "The same is "true respecting the basis and foundation of my "statement in the so-called proofs of death where I "say, 'shock from penetrating pistol shot wound of "'the head; right temple; mental aberration super-"'induced by chronic headache.' That statement "also was based upon the same information and "examination that I have already detailed and no "other" (Record, pp. 28, 29).

A representation which states a probability, or a possibility, or is conjectural, is not to be relied upon, and has not the weight of an expression of facts upon which an estoppel could be based, and does not exempt the party to whom the representation is made from examining into the truth of the matter.

Akin *vs.* Kellogg, 119 N. Y., 442, 449.

The proofs of death contained no assertion, therefore, that Edward F. Hall met his death by suicide while laboring under temporary aberration of the mind.

(4th.) It was insisted by the counsel for the defendant on the trial that the case of Insurance Company *vs.* Newton (22 Wall., 32), supported the defendant's contention that the plaintiff should be bound by the proofs of death, but the decision in that case does not go to the length necessary to support the contention of the defendant.

In Insurance Company *vs.* Newton (*supra*) the plaintiff having closed her case the company offered as evidence the preliminary proofs of death of the party insured. The Court excluded them, and the company excepted. But, as Mr. Justice Field said,

"The Court allowed the statement of the company, "and its agent, to the witness as to the sufficiency "of the proofs of death of the insured to be received "as conclusive of that fact:" and the error of the Court below, according to the decision in this Court, was in excluding the proofs themselves, when an admission which related to the entire proofs had been received. Justice Field said: "The whole "admission should therefore have been taken to- "gether. If it was necessary to establish the death "of the insured it was also sufficient to show that "the death was occasioned in such manner as to "relieve the company from responsibility; but the "Court also erred in excluding from the jury proofs "presented of the death of the insured when offered "by the company."

In the present case, the Court did not exclude from the jury the proofs of loss. It permitted them to go to the jury, and charged the jury that they were proper evidence to be considered by them, and that they were to be "taken by the jury in con- "nection with the other testimony in the case and "given such weight in determining the main "question as the jury may see fit to give them" (Record, p. 37).

This part of the charge was in harmony with the decision in the case of Insurance Co. *vs.* Newton (*supra*) as well as with the decisions in the New York cases.

In the case of Insurance Company *vs.* Newton (*supra*) the Court said: "There are many cases "which hold that where a mistake has occurred in "the preliminary proofs presented, and no corrected "statement is furnished the insurers before the trial, "the insured will not be allowed on the trial to "show that the facts were different from those "stated" (citing cases). "It is not necessary, how- "ever, to maintain any doctrine, as strict as this in "the present case, and possibly the rule there laid

"down is properly applicable only where the "insurers have been prejudiced in their defense by "relying upon the statements contained in the "proofs of loss. Be that as it may, *all that we now* "*hold is that preliminary proofs of loss are admis-* "*sible as prima facie evidence of the facts therein* "*stated against the insured and on behalf of the* "*company.*"

The doctrine thus laid down agrees with the ruling in the New York cases so far as it intimates that it must be shown that the company was prejudiced in their defense, by relying upon the statements in the proofs of loss, in order to make them binding upon the plaintiff; and of this there was no evidence in the present case.

(5th.) In speaking of the effect of the proofs of death in Insurance Co. *vs.* Newton (*supra*), the Court said: "Unless corrected for mistake the in- "sured was bound by them. Good faith and fair "dealing required that she should be held to her "representations deliberately made, *until it was* "*shown that they were made under a misapprehen-* "*sion of the facts, or in ignorance of material mat-* "*ters subsequently ascertained.*"

In the present case, the case, when closed, contained evidence which corrected the proofs of death, and which showed that the plaintiff when she made the proofs was in ignorance of material matters which were subsequently ascertained. The defendant called Dr. Conway, the physician who was first called in after the discovery of Mr. Hall's condition; Lizzie Spec, the servant, who first went to Mr. Hall's room, and Mrs. Gertrude Graham, who also was among the first to go into Mr. Hall's room. The examination, both direct and cross, of these witnesses elicited much to show that the proofs of death, in so far as they contained any declaration relating to the death, were a mere surmise and conjecture, and, in

fact, a mistake; and that they were made under a misapprehension of the facts. It is evident that, if Mrs. Sargent had known, at the time she made the proofs, the facts testified to by Lizzie Spec as to the call for help, and the door of Mr. Hall's room being found open, and the facts testified to by Dr. Conway as to the composure of Mr. Hall's body, as to the wound not being probed, and no ball being found, she would have made an entirely different statement from what she did in the proofs of death.

The testimony of these witnesses and of Dr. Jenkins himself upon the trial corrected the statement which he made in the proofs of death, and served to show that he made that statement without a correct knowledge of the facts relating to Mr. Hall's death.

The plaintiff called as a witness John Sherman Moulton, whose testimony showed that the plaintiff never saw the inquest, never assented to its statements, knew absolutely nothing of what was contained in it; that neither she nor her agent, Mr. Charles W. Moulton, was responsible for any declaration which it contained. Mr. John Sherman Moulton testified that when he received it from the Coroner he tore open the envelope, saw the certificate of the Coroner, and then looked no further, but put it in another envelope and took it to the company (Record, p. 26). This was a week or ten days after the proofs of death had been presented (Record, p. 15).

The testimony of Dr. Conway and Dr. Jenkins showed that there was no post-mortem examination; no probing of the wound; no evidence of powder or burning upon the skin, and proved that their opinions as to the cause of the death contained in the proofs and in the paper purporting to be the verdict of the Coroner, were mere inferences, and based, for the most part, upon hearsay statements, and not upon any proper evidence, and upon no intelligent examination of the wound. The evi-

dence of these witnesses furnished to the Court and to the jury the test for determining the exact value of the declarations contained in the proofs, and in the paper purporting to be a coroner's verdict. The result of all this testimony, and the testimony of the other witnesses, was to explain and correct the proofs, and this the plaintiff was at liberty to do. The admission of this testimony did not deprive the defendant of any benefit as to the proving of its defense, but gave it the fullest benefit of every element in the case, whether in the proofs or in the so called Coroner's inquest, or in the testimony, that could by any possibility promote the defense.

(6th.) It appears from the statement in Insurance Company *vs.* Newton (*supra*), that "the proofs of "death consisted of several affidavits giving the "time, place and circumstances" of the death of the insured, "and the record of the jury upon the Cor- "oner's inquest." And the Court said: "The nar- "ration of the manner of the death of the deceased "was so interwoven with the statement of his death "that the two things were inseparable." In the present case it was quite otherwise The policy did not require the production of the Coroner's inquest. It was not presented with the proof, nor made any part thereof. The plaintiff never saw it, and neither she nor her her authorized agent, Charles W. Moulton, according to the testimony, had anything to do with the presentation to the defendant of the paper purporting to be an inquest (Record, p. 26).

There is nothing in the contract of insurance requiring the production of the Coroner's inquest in case of death. In the absence of any requirement in the policy or usage known to the plaintiff that the inquest of the Coroner must be furnished as part of the proofs of death it could not be required (Taylor *vs.* Ætna Life Ins. Co., 13 Gray, 434; B. L. T. & S. D. Co. *vs.* K., T. & M. M. A. Ass'n, 126 N. Y., 458).

The blank proofs of death furnished to the plaintiff by the association, which the plaintiff filled out and signed, said: "In case of Coroner's inquest furnish the association with the verdict of the jury and all the evidence on which such verdict was based"; but this clause did not require the plaintiff to furnish the verdict of the jury, except in case there was a Coroner's inquest, and in the present case there had been no Coroner's inquest held at the time when the proofs of death were furnished by the plaintiff, consequently she could not be required to furnish a Coroner's inquest as part of the proofs of death.

There was no evidence that the plaintiff ever authorized or acquiesced in the presentation of the so-called Coroner's inquest by Mr. Moulton, but the testimony of Mr. Moulton showed that she never saw it and knew nothing about it. In Rogers *vs.* Murray (110 N. Y., 658-659) evidence was admitted of representations by persons in charge of the bank as tending to show that the plaintiff relied on the representations in making his deposits, and the Court of Appeals said: "It was plainly admitted upon the point of equitable estoppel, and the fact proved was one of the essential elements to a recovery on that ground; but, until supplemented by proof that the defendant authorized or acquiesced in the making of the representations, a recovery on that ground could not be supported. If the additional proof was not given the plaintiff would fail to establish the estoppel."

In Cliff *vs.* the Mutual Benefit Insurance Co. (99 Mass., 317) the beneficiary had submitted, in connection with the preliminary proofs of death, certain slips cut from newspapers showing reports that the insured had died in known violation of law. On the trial upon the issue whether the plaintiff had ninety days previous to the commencement of the suit furnished the company sufficient proof of the death of the insured the plaintiff put in evidence

certain affidavits by which that proof had been made, but did not offer the slips. The latter were then offered by the company and were excluded, and the Supreme Court in reviewing the case held that the exclusion was not a valid ground of exception, unless it plainly appeared that the insurers were prejudiced thereby, and that they were not so prejudiced because the fact of death was otherwise sufficiently shown. "When an apparent ground of defense," said the Court, "is disclosed by a separate and unnecessary narration of circumstances and the proofs required by the policy are complete without that narration and disclosure, it cannot be said that the party has failed to comply with the conditions imposed upon his right to litigate his claim, and the effect of such disclosure to defeat the action must depend upon the degree to which the plaintiff is bound by the statement. If not sworn to by the plaintiff, nor treated by him in such manner that he is concluded by his conduct, the whole question will be open to explanation and proof upon the main issue subject to the usual rules of evidence."

The contents of this so-called Coroner's inquest formed no part of the representations of the claimant in the proofs of death. It was not embodied in the proofs, and no statement concerning it was contained in the proofs.

Mr. John Sherman Moulton, who obtained this paper and delivered it to the defendant, was not at the time the agent or attorney of the plaintiff and no act or statement of his could be held to be authorized by or binding upon the plaintiff. The plaintiff testified that Charles W. Moulton, who was deceased at the time of the trial, and his firm of Johnson, Levy & Moulton were the only persons who represented her as agent or attorney in the matter of presenting the proofs of death and prosecuting the claim against the company (Record, p. 14).

What Mr. John Sherman Moulton did, therefore,

in the absence of evidence that he was agent for the plaintiff, or specially authorized by her, cannot be held to be her act, or in any way conclusive against her.

Mr. Moulton testified as to the circumstances of the presentation of this paper to the company: "I "went to the company and presented the proofs of "loss. They then asked me if there was a Coroner's "verdict." * * * "After I presented the first "proofs of loss they asked me if there was any "Coroner's verdict, I told them at that time, I did "not know." * * * "I then went to the Cor- "oner's office, as the company had asked me for the "Coroner's verdict; and I asked them if there had "been an inquest on the body of Mr. Hall. The "Coroner said that it had not been made up, but "he would make it up and send it to me. A couple "of days after that I sent a messenger boy to the "Coroner's office, and it was given to him: that is, "a paper was given to him in a sealed envelope. "I tore it open, looked at the first page, saw the "certificate of the Coroner, and then looked no "further, but put it in another envelope and took "it to the company, and delivered it to the same "party to whom I had delivered the first proofs. "The plaintiff did not see the inquest. To the best "of my knowledge, Mrs. Sargent was at that time "at her home in West Medford" (Record, p. 26).

Andrew S. Brownell testified that the proofs of death, Defendant's Exhibit D, were received by the company about a week or ten days prior to the 13th of December, 1886. He testified also that the paper purporting to be a coroner's inquest, Defendant's Exhibit C, was received on December 13, 1886. A week or ten days elapsed therefore between the presentation of the proofs of death and this so-called inquest.

Mr. Brownell testified that he stated to Mr. Moulton that, as far as they went, the proofs presented

were satisfactory, but that "we" (the company) "must have the Coroner's verdict" (Record, p. 34).

The company had no right to require a coroner's inquest to be presented. The policy did not call for it. But the defendant's counsel may say that the blank furnished by the association contained the following clause: "In case of Coroner's inquest, "furnish the association with the verdict of the "jury and all the evidence on which such verdict "was based." The blank furnished did contain this clause (see Exhibit C, Record, p. 50). And what answer did Mrs. Sargent make to it? Nothing. She could make no answer, because there was no coroner's verdict. No answer whatever therefore is made. And that blank, not filled, showed the defendant what the true fact was, and that was that there had been no coroner's inquest.

Mrs. Sargent, therefore, when she verified the proofs of loss, November 24, 1886, made no statement in them that there was a coroner's inquest. She was only obliged by the wording of this clause in the blanks furnished her for proofs of loss to furnish the verdict of the jury, "In case of Coroner's inquest," and, as no coroner's inquest had been held on the body of Mr. Hall, she could not comply with this condition and the company could not require it. She, therefore, wrote nothing after this clause in the proofs as she could not state that there was a coroner's inquest when none had been held, and could not furnish "the verdict of a jury," "and the evidence on which it was based," when no verdict existed.

Did not the fact, that Mrs. Sargent left this blank unfilled, place the defendant upon investigation; and, when Mrs. Sargent had declined to fill this blank, and thus given the company to understand that there was no coroner's inquest, had it a right to rely upon a pretended coroner's inquest, produced, neither by the plaintiff nor by her agent, ten or

thirteen days afterward, which, on its face, bore the stamp of untruth, because it stated that the inquest was held at the house No. 67 Park row (Coroner's office) on the body of Edward F. Hall, Jr., by Coroner John R. Nugent, on the 10th day of December, 1886, that is, nearly two months after Edward F. Hall, Jr., was buried in Mount Auburn Cemetery, Cambridge, Massachusetts (Record, p. 14), and a week or more after the proofs of death had been furnished to the company? (Record, p. 16.)

Could Mr. Brownell, who had noticed the absence of the Coroner's verdict, when the proofs were presented to him; or, could any officer of the defendant have been deceived or misled by this transparent fraud?

Mr. Brownell testified that he knew of the death of Mr. Hall, as a fact, about a week or ten days after it occurred (Record, p. 17). That would have been about the 26th or 29th of October, 1886. He knew, therefore, that an inquest could not have been held on Mr. Hall's body on the 11th of December, 1886.

His attention was called also to the fact that there was no coroner's inquest when the proofs were presented to him, about the 4th of December, 1886, by the plaintiff, with that blank in the proofs relative to a coroner's inquest unfilled. He testified that he told Mr. Moulton they were incomplete, and that the Coroner's verdict did not accompany them as directed (Record, p. 33). He knew, therefore, that a coroner's inquest, purporting to be taken on December 11, 1886, a week after this interview with Mr. Moulton, was an official lie. He could not suppose that an inquest, purporting to have been held nearly two months after a body was buried in another State, was any part of the proofs of death verified by the claimant more that two weeks prior to the date when the inquest purported to have been held; and the defendant had no right to accept or rely upon

this inquest as a part of the proofs, when the claimant in her sworn proofs had, by not filling out the blank with reference to a coroner's inquest, given the company clearly to understand that no coroner's inquest had been held.

The affidavits which went to make up this pretended inquest were only hearsay statements, so far as they related to the cause of the death of Mr. Hall. They would not have been evidence in any court of law. They were not adopted by the plaintiff nor referred to by her, nor made by her any part of her statement, and she was not in any way responsible for the pretended inquest being made out or presented to the defendant.

In Goldschmidt *vs.* Mutual Life Ins. Co. (102 N. Y., 493), Danforth, *J.*, said: "The only claim "was that the copy of the proceedings on the in- "quest, given in addition to the proof required by "the policy, made out a case of suicide, and required "the plaintiffs to show the contrary. I can discover "no principle upon which such a proposition can "stand. The policy makes no provision for it. The "original proceedings would not be evidence upon "the issue. Its verity is not admitted by the claim- "ant; it is denied. It could not have been required "by the defendant; it was not adopted by the plain- "tiffs, but, out of what must now seem ill-advised "courtesy, was furnished to the defendants at their "request. It contains matter which, if properly "substantiated, would have availed the defendants "in maintaining an affirmative defense, but in no "view suggested to us by the learned counsel for the "respondents could it, as now presented, change "the burden from them to the plaintiffs."

In Taylor *vs.* Ætna Life Ins. Co. 13 Gray, 438), Metcalf, *J.*, says: "The policy does not embody, nor "refer to any by-law, requisition, usage or under- "standing of the defendants as to the kind of proof "which they should require of the death of Taylor.

" * * * He is bound only by the policy itself. " * * * The question what is due proof is to "be determined by the Court, according to the rules "of evidence, and not by the defendants, nor by any "other life insurance company."

The paper purporting to be a Coroner's inquest, in the present case, was perfectly worthless as documentary evidence in any court of law, because it showed, upon its face, that it was not made in compliance with the laws of the State of New York relative to an inquest to be taken by a Coroner (Code of Crim. Proc., §§ 773-788). Mr. Hall died at 139 East Twenty-first street, in the City of New York, on October 19, 1886, and he was buried in Mt. Auburn Cemetery, Cambridge, Mass., on the 22d of the same month. The so-called inquest purported to have been taken, not by the Coroner, Ferdinand Levy, but by John R. Nugent, professing to act for the Coroner, and not at the house, No. 139 East Twenty-first street, where Mr. Hall died, but at the Coroner's office, No. 67 Park row, on the 11th day of December, 1886, more than six weeks after the body of Mr. Hall was buried. The law requires, that: "Whenever a Coroner is informed "that a person has been killed or dangerously "wounded by another, or has suddenly died under "such circumstances as to afford a reasonable ground "to suspect that his death has been occasioned by "the act of another by criminal means, or has com- "mitted suicide, he must *go to the place* where the "person is and forthwith inquire into the cause of "the death," &c. (Code of Crim. Proc., § 773).

This so-called inquest showed on its face that the Coroner did not go to the house where the body of Mr. Hall lay, nor inquire into the cause of his death. The so-called inquest said: "An inquisition taken "at the Coroner's office, No. 67 Park row, in "the Fourth Ward of the City of New York, in the "County of New York, this 11th day of December,

" in the year of our Lord one thousand eight hun-
" dred and eighty-six, before John R. Nugent, for
" Ferdinand Levy, Coroner of the city and county
" aforesaid, on view of the body of Edward F. Hall,
" Jr., now lying dead at " (Record, p. 46).

This blank was very significant. It showed at a glance that the inquisition was not held on view of the body. It could not be held on view of the body, because the body of Edward F. Hall was lying in the cemetery at Cambridge, Mass.

The law requires that the Coroner shall summon a jury, of not less than nine nor more than fifteen persons; that " when six or more of the per-
" sons appear they must be sworn by the Coroner
" to inquire who the person was, and when, and
" where, and by what means, he came to his death," &c., and it further provides that, " After *inspecting*
" *the body*, and hearing the testimony, the jury
" must render their verdict, and certify it by an in-
" quisition in writing signed by them," &c. (Code of Crim. Proc., §§ 773, 774 and 777).

Six names purport to be so signed to the so-called inquest, but the verdict signed by them shows that they had not inspected the body as the law required, because it says the inquisition was taken at the Coroner's office, No. 67 Park row, at a date nearly two months after the body was buried, and there is a blank in the verdict as to where the body is " lying dead at ;" showing that the jury did not know where the body was (Record, p. 46).

The so-called inquest is based upon a few statements, taken at different dates, not one of which contains a jurat, and not one of which, therefore, bears any proper evidence of being sworn to by the witnesses after they had subscribed their statements, except that of William F. Jenkins, M. D. (Record, pp. 46–49).

There is no evidence that John R. Nugent had

authority to administer an oath. The affidavit of Robert Black, clerk in Coroner's office, that an inquest was held at the house No. 67 Park row (Coroner's office) on the body of Edward F. Hall, Jr., on the 11th day of December, 1886, was false on its face, because at that time the body of Edward F. Hall, Jr., was in the cemetery at Cambridge Mass. Mrs. Philena Munroe, one of the witnesses whose statement was annexed to this so-called inquest, testified on the trial that no inquest was held, and that she was not examined before any jury (Record, p. 27). Dr. John R. Conway, one of the witnesses, whose statement was annexed to the so-called inquest, testified on the trial that he did not see any Coroner's jury at the house; that he was not examined before a Coroner's jury (Record, p. 19). He testified also: "I do not think I was ever at the "Coroner's office in relation to the death of Mr. "Hall; I was never before any jury summoned or "held by the Coroner, and knew of no such" (Record, p. 24). Dr. William F. Jenkins testified on the trial: "No Coroner was present at that time, "and I believe not at any time while the body was "in Mrs. Munroe's house." * * * "Nor was any "jury there. I did not appear before any jury" (Record, p. 28). Dr. Robertson testified that the statement signed by him was signed at the Coroner's office, but he said: "Coroner Jenkins was there alone" (Record, p. 35). Dr. Jenkins was only the Coroner's physician, not the Coroner; so it appeared that Dr. Robertson's statement was not sworn to before either the Coroner, Ferdinand Levy, or John R. Nugent, as it purported to be (Record, p. 48).

What weight could be given to such a paper as this, bearing upon its face the evidence of its own untruthfulness? It was absolutely valueless as evidence for any purpose whatever. It had been, through a mistaken sense of what was required by the policy, handed to the company by Mr. John

Sherman Moulton, who was not at the time agent or attorney of the plaintiff, or authorized to act for her, who, of his own responsibility, without consulting the plaintiff, or showing her the so called inquest, procured and delivered it to the company; yet it was submitted to the jury as proper evidence in the case, and as affording proof, if the jury chose to consider it so, of the defendant's affirmative defense. The Judge certainly could do no more than this for the defendant in respect to that paper. The defendant could not have been misled, and was not misled by the paper. The plaintiff knew nothing about it, and could not be affected by it; and even had she known about it or authorized the presentment of it, it was, within the cases heretofore quoted, a mistake, which it was permissible to correct upon the trial, and which was explained and corrected by the evidence adduced on the trial.

In Insurance Co. *vs.* Newton (*supra*), Justice Field said: "No case has come under our observation other "than the present where the preliminary proofs "presented by the insured have been entirely ex- "cluded as evidence when offered by the insurers, "the question being in all the cases whether these "proofs estopped the insured from impeaching the "correctness of their statements or from qualifying "them, or whether they were subject to be ex- "plained and varied, or contradicted on the trial."

XIV.

There was no error in the portion of the Judge's charge referred to in the twelfth assignment of error (Record, p. 63). The defendant alleged in its answer that the death of said Edward F. Hall, Jr., "was brought about by his own hand and act, in

" that said Edward F. Hall, Jr., died from the im-
" mediate effect of a shot from a pistol fired by his
" own hand, such shot having been so fired by him
" with the intention of taking his own life " (Record, p. 10). This was an affirmative defense, and the burden of proving it was upon the defendant. It has been held in numerous cases where the action was on a policy of life insurance, and the defense was that the insured died by his own hand; that the defendant had the affirmative of the issue. Some of these authorities are cited and the question as to preponderance of evidence has been considered in the first point of this brief.

The defendant having the affirmative of this issue, and the burden of proof being upon the defendant it was incumbent upon it to satisfy the jury by a preponderance of evidence of the truth of its defense. In the present case the plaintiff had proved the issuing of the policy, the death of Edward F. Hall, Jr., and by its answer the defendant had admitted that the plaintiff had notified the defendant of the death of Edward F. Hall, Jr., and had furnished the defendant proofs of the death of said Hall. The plaintiff had thus established a *prima facie* case, and it has been repeatedly held that where plaintiff has given evidence sufficient to raise a legal presumption of the fact alleged, it is not error for the Court to instruct the jury that in weighing the whole evidence together they may consider that the plaintiff has given *prima facie* evidence in support of his case, and such as is conclusive if uncontradicted, and that this must be contradicted or disproved by a preponderance of evidence on the part of defendant, or plaintiff is entitled to a verdict.

Crane *vs.* Morris, 6 Peters, 598, 620.
Kelly *vs.* Jackson, 6 Peters, 622, 631.
Heilman *vs.* Lazarus, 12 Abb. N. C., 19; S. C., 90 N. Y., 672.
Jones *vs.* Brooklyn Ins. Co., 64 N. Y., 79.

In Jones *vs.* Brooklyn Ins. Co. (*supra*), which was an action upon a policy of life insurance, the assurer admitted the issuing of the policy, the death and notice and proof of death, and alleged various breaches of warranty. The Court charged the jury that plaintiff was entitled to recover, unless defendant satisfied them by a preponderance of evidence that the conditions on which the policy was issued had been broken. Held, no error.

XV.

There was no error in the Court refusing to charge the jury in terms as mentioned in the 13th assignment of error, "that although the burden of proof "is upon the defendant to show that Edward F. "Hall, died by his own hand, yet the defendant is "not bound to prove that fact beyond a reasonable "doubt, but only by a fair preponderance" (Record, p. 64).

The Court had already charged the jury in language which was the equivalent of that which is given in said assignment of error. The Judge said in his charge: "Upon that issue the burden is "upon the defendant to satisfy you by a *fair pre-* "*ponderance* of proof" (Record, p. 36).

The Court is not bound to give instruction on the particular language of a request.

Railway *vs.* McCarthy, 96 U. S., 658.

If the charge already given by the Court submits the case properly to the jury, the Court may refuse to instruct further. It may use its own language

and present the case in its own way. Neither party has the right to ask anything more.

Indianapolis, &c., R. R. Co. *vs.* Horst, 93 U. S., 291, 295.

Continental Improvement Co. *vs.* Stead, 95 U. S., 161.

XVI.

There was no error in the refusal of the Court to charge in terms as given in the 14th assignment of error (Record, p. 64).

The nature and effect of the proofs have already been considered in the 12th point of this brief.

There was no evidence that the company relied upon the proofs. The defendant did not show that it had acted or refrained from acting in reliance upon the proofs. It did not appear that the defendant based its defense upon these proofs. It introduced them in evidence, but they were relied upon as establishing a *prima facie* case in its favor. It called other witnesses to prove its defense; and the evidence of these witnesses as well as the testimony of the witnesses for the plaintiff explained and corrected the proofs.

There was no reason, therefore, why the Court should charge as requested, and there was no error in the Court refusing so to charge.

XVII.

There was no error in the refusal of the Court to charge in terms as given in the 15th and 16th assignments of error.

The plaintiff did not state to the company that the death was by suicide, and therefore it was not incumbent upon her to prove that the statement was mistaken, and that the death was the result of accident. That she was not in any way responsible for the statements contained in the so-called inquest has been clearly shown in the 12th point of this brief.

XVIII.

There was no error in the Court refusing to charge the jury in terms as given in the 17th assignment of error.

If the Court had so charged, the charge would have been too broad, for it would have covered a case of death by accident, which the policy certainly was intended to cover. The assignment of error says: "That the Court below erroneously refused to "charge the jury in terms that, if the death of Ed- "ward F. Hall ensued from any physical movement "of the hand or body of the assured, even though "proceeding from a partial or total eclipse of the "mind, the defendant is entitled to a verdict" (Record, p. 64).

The counsel for the defendant must have felt how conclusive the evidence was in this case, that the death might have been caused by an accident, or he could not have made this request, which evidently was intended to cover a case of accidental shooting. But the Court would surely have erred, if it had charged the jury that, if the pistol had been discharged by a movement of Mr. Hall's body, such as his shoulder accidentally striking the hammer of the pistol when he laid down in the bed, or by the hammer catching in the bedclothing while he was taking it from under his pillow; that in either of

these cases the defendant would be entitled to a verdict; yet either of these cases would have been included in the charge requested as "ensuing from" a "physical movement of the hand or body of the "assured."

XIX.

There was no error in the Court refusing to charge in terms as stated in the 18th assignment of error. The Court had already fully charged this in substance, because it said: "The defendant is at liberty "to say that it will not assume the risk of death by "suicide." * * * "In other words, it is a part of "the written contract between these parties, and if "it had been violated, if the plaintiff or Hall has "violated the contract, it is, of course, entirely clear "that the plaintiff cannot recover." * * * "The "only question upon this proof is, did Edward F. "Hall commit suicide? If he did, the policy is "void." * * * "A condition in a policy of life "insurance declaring it void in case of the death of "the insured by his own hand or act sane or insane "is valid; and if an insured commits suicide, "although at the time utterly bereft of reason, it is "a death by his own hand or act, within the mean-"ing of the condition, and the policy is forfeited. "So, gentlemen, you will bear in mind that the "question for you to answer in this case is this: Did "Edward F. Hall commit suicide? If he did it "is wholly immaterial whether he was in his right "mind or laboring under insanity. If upon that "issue you say that he did commit suicide your ver-"dict must be for the defendant" (Record, pp. 36–38).

The defendant could not legally have asked for a more favorable charge upon this point than the

Court had thus charged, and it was no error to refuse to charge in the precise language of the request.

XX.

There was no error in the Court refusing to charge the jury in terms as given in the 19th assignment of error (Record, p. 64).

The charge already given by the Court covered the question of the liability of the defendant in case the jury found that Mr. Hall shot himself.

The Judge called the attention of the jury to the clause in the policy relative to suicide, which was in evidence, and told them that this was a provision which the parties understanding it had a perfect right to insert in the agreement. The defendant, he said, was at liberty to say that it would not assume the risk of death by suicide. Then he said, if the contract had been violated by the plaintiff or Hall, the plaintiff could not recover. He charged the jury that if Hall committed suicide the policy was void. He called the attention of the jury to the evidence as to Hall's suffering from headache, and melancohlia, to the circumstances of his being found in his room with a severe wound in his right temple, and the evidence of the physicians as to the character of the wound, and to the letter found at his bedside. He submitted to them the proofs furnished by the plaintiff to the defendant, and the so called coroner's inquest, and told the jury these were evidence to be considered by them. Then he charged them in the following words: "The defendant asserts that "taking all of the facts and circumstances in the "case, the position of Hall, the position of the pistol, "the letter stating that he was suffering such agony, "and the conclusion is irresistible that he

"met death by his own hand intending to "kill himself, whether he was at that "time possessed of his reason, or whether he was "laboring under temporary insanity." He further charged them as follows: "Upon the main ques- "tion on this case, gentlemen, I adopt the language "of the Court of Appeals of this State, which is "found in the head-note of a case referred to, and it "is this: 'A condition in a policy of life insurance "'declaring it void in case of the death of the insured "'by his own hand or act, sane or insane, is valid; "'and if an insured commits suicide, although at the "'time utterly bereft of reason, it is a death by his "'own hand or act within the meaning of the con- "'dition, and the policy is forfeited.' So, gentlemen, "you will bear in mind that the question for you to "answer in this case is this: Did Edward F. Hall "commit suicide? If he did it is wholly immaterial "whether he was in his right mind or laboring "under temporary insanity. If upon that issue you "say that he did commit suicide your verdict must "be for the defendant" (Record, pp. 37, 38).

The defendant could not require a more favorable or more explicit charge than this, unless they have a right to ask that the Court, after charging fully upon a question, shall servilely follow the language of a request to charge upon the same point. If the charge already given covers the entire case, and submit it properly to the jury, the Court may refuse to give further instructions.

Indianapolis R. R. Co. *vs.* Horst, 93 U. S., 291.

Rexter *vs.* Starin, 73 N. Y., 601, 603.

Holbrook *vs.* Utica & Schenectady R. R. Co., 12 N. Y., 236, 245.

The style and mode of expression used by the Judge to give instructions are discretionary.

Continental Improvement Co. *vs.* Stead, 95 U. S., 161.

XXI.

The Court properly refused to charge the jury in terms as given in the 20th assignment of error (Record, p. 64).

(1st.) It was not shown as a fact that the proofs of death were presented to the defendant by the plaintiff's agent.

The plaintiff testified that the only agents she had in the matter of prosecuting her claim against the company, and presenting the proofs of death were Mr. Charles W. Moulton, who was dead at the time of the trial, and his firm of Johnson, Levy & Moulton (Record, p. 14). The proofs of death and the so-called Coroner's inquest were delivered to the defendant by Mr. John Sherman Moulton (Record, p. 15), and there was no evidence that he was the agent of the plaintiff, and her evidence was to the contrary.

John Sherman Moulton testified: "I am one of the attorneys for Mrs. Sargent, plaintiff;" but this was after his father's death, and after the presentation of the proofs of death and the commencement of this suit. The summons and complaint show that Moulton, Johnson & Levy were plaintiff's attorneys when the action was commenced (Record, pp. 2 and 5), and they continued to be the attorneys for the plaintiff until Mr. Winslow was substituted, March 5, 1888.

John Sherman Moulton testified: "I have very "little knowledge of the so-called proofs of death "which have been produced here. I do not know "how they were prepared. I knew of their service "upon the company, but I did not know what they "were. I delivered the so-called proofs of death to "the company. My recollection of it is to a young "man in the office. I think it was Mr. Baker";

(Record, p. 25). This testimony is confirmed by Mr. Baker, who testified that Mr. John Sherman Moulton handed the proofs to him (Record, p. 15.)

It would not have been strictly in accordance with the evidence, therefore, for the Court to have charged that the proofs were presented by the agent of the plaintiff.

(2d.) The Court was not required to charge: that the proofs "must be taken as true until at least "some mistake is shown to have occurred in them." The evidence of the witnesses who had testified on the trial showed that the proofs, as far as they contained any declaration as to the cause of Mr. Hall's death, were made under a misapprehension of the facts, and the Court was not bound, therefore, to charge the jury that they were to be taken as true until a mistake was shown, when the fact of the mistake had already been made apparent by the evidence before the jury.

XXII.

There was no error in the Court refusing to charge the jury in terms as stated in the 21st assignment of error (Record, p. 65).

There was no evidence in the case which would have warranted the Court in so charging.

The statement in the proofs of death did not show that the plaintiff by such proofs of death claimed that the deceased died by his own hand, during a moment of mental aberration.

The plaintiff made no statement whatever in the proofs of death as to the cause of death; and all that Dr. Jenkins, to whose statement she referred, said as to the immediate cause of death, was: "Shock from penetrating pistol shot wound of

"head (right temple); mental aberration su-
"perinduced by chronic headache." He did not say that the pistol-shot wound was self-inflicted, and he did not say that the pistol shot was caused by mental aberration. He simply gave it as his opinion that Hall was suffering under mental aberration superinduced by chronic headache, but he did not say that he shot himself while so suffering, and his opinion was only conjectural and not based on any knowledge of his own as to Mr. Hall's condition. He did not answer in the affirmative the question in the proofs: "Was the death of "deceased caused, or accelerated, or aggravated by "his own hand or acts?" and the proofs did not contain any statement which would have warranted the Court in charging as the counsel for the defendant requested.

As for the so-called Coroner's inquest it was no part of the proofs; it was not presented by the plaintiff or her agent; she knew nothing of it, had never seen it, and did not make it any part of her proofs of claim.

XXIII.

There was no error in the Court refusing to charge in terms as given in the 22d assignment of error that the plaintiff has failed to give evidence that the death was accidental.

(1st.) It was not obligatory upon the plaintiff to show that the death was accidental. The burden of proof was upon the defendant to show the death was by suicide, and that burden never shifted.

The defendant was bound to make at least a *prima facie* case of suicide, before the plaintiff was bound to give any proof at all to contradict the

affirmative defense. Upon the question of suicide or not suicide the defendant held the affirmative of the issue throughout the trial. The burden of maintaining the affirmative of the issue involved in the action is upon the party alleging the fact which constitutes the issue, and this burden remains throughout the trial.

Heineman *vs.* Heard (62 N. Y., 448, 454).
Lamb *vs.* Camden & Amboy R. R. Co. (46 N. Y., 271).
Heilman *vs.* Lazarus (90 N. Y., 672).
Blunt *vs.* Barrett (124 N. Y., 119).

(2d.) The Court could not charge the jury that the plaintiff had failed to give any evidence that the death was accidental. Evidence had been given from which the jury could properly draw an inference that the death was accidental.

(*a.*) Lizzie Spec testified as to a call for help being heard. This is just what might have happened if Hall had accidentally shot himself; that is, he would have called for help.

(*b.*) When Lizzie Spec went upstairs she found Hall's bedroom door open. If Hall had intended to commit suicide he would not have left his bedroom door open and called out for help.

(*c.*) The absence of any traces of burning on the skin or appearance of powder about the wound showed that if Mr. Hall died from the effect of a pistol shot, he did not hold the pistol close to his head as a man intending suicide would do; and gave room for the inference that, while sitting up, or partly sitting up, in bed and examining the pistol to see if it was loaded, he might have accidentally discharged it, and the ball might have penetrated his

head, although the pistol was at a distance from his face. This would account for the absence of burning of the skin, or powder about the wound; but the absence of these traces of burning, or of powder, is inconsistent with the theory of suicide.

(*d.*) The evidence in the case showed that the pistol went off at half-cock, and this was a circumstance going to show that the pistol might have been accidentally discharged.

(3d.) The Court was not bound to charge the jury that the plaintiff had failed to give any evidence that the death was accidental. The Court is not bound in any case to express an opinion on a question of evidence.

Chesapeake & Ohio Canal Co. *vs.* Knapp (9 Pet., 541).
Smith *vs.* Carrington (4 Cranch, 62).
Van Ness *vs.* Pacard (2 Pet., 157).

Whether evidence is admissible is for the Court; whether it is sufficient, for the jury.

Bank of the Metropolis *vs.* Guttschleck (14 Peters, 19).

To decide what facts are found and what credit is to be given to the witnesses, are questions within the exclusive province of the jury.

Ewing *vs.* Bennett (11 Pet., 41).

It is not error to refuse to express an opinion on the sufficiency of evidence, if the evidence is not sufficient to warrant a peremptory ruling in favor of the party relying on it.

Moore *vs.* Meacham (10 N. Y., 207.)

XXIV.

There was no error in the Court below refusing to charge in terms as stated in the 23d assignment of error (Record, p. 65).

(1st.) It is error for the Court to tell the jury without qualification that the evidence proves a particular fact; and in the request to charge, on which this assignment of error is based, the Court was asked to tell the jury that the evidence proved the very fact in issue, and the burden of proving which was upon the defendant, in order to maintain its affirmative defense, to wit, that the deceased was shown "to have died by his own hand and act." For the Court to have so charged would have been for it to have usurped the province of the jury, and to have made itself a trier of the facts in controversy.

(2d.) It was not true, as assumed in the request to charge, that the deceased was "shown by the complaint and proofs "of loss to have died by his own hand and act." The complaint said nothing about the cause of Mr. Hall's death, except that it distinctly alleged "that his death was not caused by any of the causes "excepted from the operation of this policy" (Record, p. 5); and the proofs of death did not contain any statement that Mr. Hall died by his own hand and act.

Counsel is not entitled to assume the existence of facts and ask a charge to the jury, based upon such assumptions.

N. J. Mutual Life Ins. Co. *vs.* Baker (94. U. S., 611).
Orleans *vs.* Platt (99 U. S., 677).

Prayers for instructions which overlook facts of which there is evidence, or which assume as fact

that of which there is no evidence, are properly refused.

Lucas *vs.* Brooks (18 Wall., 436).

XXV.

There was no error in the Court's refusal to charge in terms as stated in the twenty-fourth assignment of error (Record, p. 65).

If the request to charge meant that the defendant was entitled to a verdict, even in case it was proved that the death of Mr. Hall was caused by some form of accident, such a charge would certainly have been error. It was in vain for the defendant after distinctly alleging in its answer "that the "death of said member, Edward F. Hall, Jr., was "brought about by his own hand and act, in that "said Edward F. Hall, Jr., died from the imme- "diate effect of a shot from a pistol fired by his "own hand, such shot having been so fired by "him with the *intention of taking his own life;*" after all the evidence had been put in on the trial, and it was apparent from the evidence that the death of Edward F. Hall, Jr., might have been caused by an accident; to assert then, that even if the death was accidental the defendant was not liable. If the death of Edward F. Hall was caused by any form of accident, no matter what, provided his death was not brought about, as the answer alleged, "by his own hand and act," "from the immediate effect of a pistol shot fired "by his own hand," "with the intention of taking "his own life," then the defendant was liable.

The defendant did not ask on the trial to amend its answer, and it was bound to prove the defense

as alleged. The defense must be made out not only *secundum probata*, but *secundum allegata*. A party must recover not only by his proofs, but upon his allegations. The facts stated must constitute a cause of action or defense, and they must be in evidence. It is not enough that they stand upon proof unless that proof is preceded by statement.

Clark *vs.* Post (113 N. Y., 17, 27).

The defendant was bound therefore to make out a case of suicide, according to the allegations of its answer, which should exclude every theory of accident. If the death was accidental, it was not suicidal. A person who accidentally kills himself by snapping a loaded pistol, when he supposed it had no load in it, or did not know that it was loaded, does not die by his own hand or act within the meaning of the clause in the policy under consideration, though he might literally die by his own hand, that is, by his own act. Eastbrooke *vs.* Union Life Ins. Co. (54 Me., 224).

A condition in a life insurance policy, that it shall be void if the insured shall die by suicide, whether the act be voluntary or involuntary, does not apply where the death is the result of accident or unintentional self-killing. Keels *vs.* Mut. Reserve Fund Life Ass'n (C. Ct., S. C.), 29 Fed. Rep., 197.

When there is a doubt whether the death of the insured was the result of accident or of suicide, the doubt should be solved in favor of the theory of accident (*Id.*)

XXVI.

It was not error for the Courts to refuse to charge the jury in terms, as stated in the 25th assignment of error, that the presumption is against the theory of murder.

There was no presumption of law which could have any application in this case. Whether he was murdered or not murdered, was a question of fact, and that was for the jury to determine.

If the counsel for the defendant meant by the request to charge that there was presumption from the facts to prove that Mr. Hall was not murdered, that presumption or inference was for the jury to draw, not for the Court to declare. Certainly no such presumption or inference could be drawn from the facts in this case, for there was the cry for help, the door left open, presumably by the assassin in his flight, the murdered man lying stretched upon his bed with his limbs composed, the clothes drawn up well over his body and spread smoothly, just as he was lying when the assassin struck him; a severe wound in his head from which the blood was pouring, a pistol lying a little distance from his right hand on the outside of the bedclothing, a few inches from his right hand, presumably either placed there by the assassin in order to conceal his own crime and to give the appearance of the act being a suicide, or fallen from the relaxed hand of Mr. Hall when he raised it vainly in self-defense; no pistol shot heard; no ball found in the skull, and no hole on the other side to show that the bullet had pierced its way through the skull. All these are circumstances from which it might have been inferred that a murder was committed. Certainly it could not be said, in view of all this evidence, that the presumption was that a murder had not been committed.

XXVII.

The record clearly shows that the verdict was properly given for the defendant in error, the plain-

tiff in the Court below. The evidence was circumstantial and permitted inferences favorable to the plaintiff; the burden of proving suicide affirmatively was upon the defendant; the Judge charged the jury with great care and ability; the propositions of law were stated on the whole more favorably for the defendant below than for the plaintiff, and the question of fact was fairly submitted to the jury for determination; none of the exceptions to the charge or to the refusals to charge were well taken; and the jury, acting within their own province, drew their inferences, and found a just verdict in accordance with the law and with the evidence and with natural justice. The Constitution of the United States and the decisions of the courts protect the verdict of the jury against disturbance; and no reason exists for questioning the justice or the propriety of the verdict in this case.

XXVIII.

The judgment, entered on the verdict of the jury, should be affirmed, with interest and costs.

MIRON WINSLOW,
Attorney for Defendant in Error.

T 16 S. R. 17 W. 26 E

29-30

S. 17.

71.90

S. 39.
a - 8854.70

Moses E. Levy.

S 75 E
175.17
523.50

S. 38
a - 519.00

S 80 W
143.25

S. 19.

MOSES. E. LEVY
Agt a. 10.A 37.80

All scrub

N 15° E
259.
323.50

S 15° W
215.00

Antonio Huentas
Range Line

N 75° W
323.00

S. 37.
a 827.80

S 38
a 248.40

S. 4

S. 3.

S. 2

S. 1.

S. 6

S 5

No. 139 Bird V. Benlisa } p 29-30

T 16 & 17. Range 27 & 28 Se 8.

Surveyed in March and April 1888 by Chas. F. Hopkins — County Surveyor for Duval Co. Fla.

Louis Hogan } Chairmen
J.W. Sanders }
Joseph Whitney } Axemen

Old original Cypress 3 ft in diameter marked "X" N.C.

S 16.

S 25.

S 17

Sec 3
MOSES E. LEVY.

S 75° E. 383.12 chs.

Sec 39. 885.476 A.

Sec 38
519 ac
S 80 chs

Post original Pine marked "X C"

S 19

Alexander Spring Ck.

N 15° E. 32.00 chs.

Moses E. Levy
Aggregate Area. 10457.45 acres.

S 13° W. 523.37 chs.
324.00
Antonio Huertas

Range line between 27 & 28.

Township line between 16 & 17

S 37
822.80 a

S 38
248.40 a

N 75° W To close Grant on point of beginning
N 75° W 323.00

35.25 ch.

Original Pine marked "X C" blazed

Range line of 27 & 28

4 3 2 1

No. 139.
Bird
N.
Benlisa
p. 32-33